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SIR JOHN MACDONELL, K.C.B., LL.D., F.B.A.,

AND

EDWARD MANSON, Esq.

ASSISTED BY

C. E. A. BEDWELL, Esq.

"Δεί καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ'ὀρθῶς ἔχον ὀφθῇ καὶ τὸ χρήσιμον."—Arist. *Pol.* II. 1.

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FOUR INTERNATIONAL JURISTS.

DEATH has of late been busy in the world of jurisprudence. It has removed within twelve months the four jurists whose portraits appear in this number of the Journal. All of them had the same high aims and the same sense of the dignity and value of their calling. All of them possessed European reputation and exercised influence outside their own countries. They all belonged to that small but increasing group of men, not necessarily Ministers of State, judges, or diplomatists, who help to mould and strengthen the public opinion which is the real sanction of International Law, and who may be said to express the conscience of the civilised world. It is to be noted that all of them were members of the Institute of International Law, and that in connection with it much of their best work was done. There the points of likeness end; each had a distinct individuality. Professor Westlake (of whom, by the way, a charming volume of recollections, the contributions of his friends, has just been published) left his mark chiefly upon private international law; he did more than any other English writer to bring it to its present state. His work in the domain of public international law was also of a high order. He brought to it a mastery of principles and a rare degree of analytical acuteness. In the discussions in the meetings of the Institute he was seen at his best, exhibiting, to quote the words of one of his colleagues, "une dialectique serrée et puissante, une parfaite bonne foi." No English judge was so well known abroad as Dr. Westlake; the magnitude of his reputation was realised by not a few of his countrymen only when he died and was brought home to them by the tributes to his memory paid by distinguished foreign jurists.

A colleague, Professor von Bar of Göttingen, died shortly after the meeting of the Institute at Oxford. His voluminous writings upon private international and criminal law are marked by thoroughness, judicial spirit, and the stamp of good sense not always found in scientific jurisprudence. But to appreciate him it was necessary to listen to him when debating points of principle; his knowledge, vivacity, acuteness, courtesy, and a spoken style much clearer than his writings gave his speeches at once a certain charm and authority.

The third portrait is that of M. Asser, the friend and colleague of the two above named. One of the founders of the Institute of International Law and of the *Revue de Droit International*, he has for many years been a

well-known writer on International Law. His countrymen, grateful for his many services, are desirous of raising a monument to his memory and the appeal speaks with warmth and truth of his many-sided character, and of his reputation as professor, juridical writer, representative of Holland in international conferences, arbitrator, administrator and counsel.

M. den Beer Poortugael was the author of no work of great importance; he does not rank with the three jurists above named. But for many years he took part in the proceedings of the Institute, to which he brought not merely sagacity and learning, but the practical knowledge of a soldier. All four in their vocation obeyed the injunction of Bacon to lawyers to have freedom of opinion, not to speak as it were in bonds, and "to go to the fountains of justice and public expediency."

THE MEANING OF TRUTH IN HISTORY.[1]

[*Contributed by* The Right Hon. Viscount Haldane of Cloan, K.T., D.C.L., LL.D., F.R.S., *Lord High Chancellor of Great Britain.*]

The occasion on which it is my privilege to address you is one which is associated with the name of a remarkable man. He possessed gifts of intellect and of character which would have made him eminent in careers other than the one he chose for himself. But he held tenaciously the principle adherence to which is essential for a man who genuinely aspires to accomplish anything lasting. He knew that he must concentrate, and he did so. He lived a dedicated life—dedicated to the service of his God and his Church, as he conceived them. Such were his gifts that his work deeply impressed with the sense of its reality those who were permitted to come near him. The impression he made was heightened by his obvious conviction that he could best render the service to which he had consecrated his life by following truth unswervingly, and seeking as well as he could to extend the province of genuine knowledge. The result of an unfaltering adhesion to this principle was that his writings produced on the public an impression of sincerity and thoroughness—an impression which deepened as time went on. In so far as he devoted his gifts to the study of history it was therefore natural that his integrity of purpose and his desire for the truth should lead to his becoming known and trusted as an historian of a wide and searching outlook. It accords with what is fitting that among the memorials erected to him there should have been included this lectureship. To me it has fallen to be the lecturer this year, and to choose a topic that is appropriate. What Bishop Creighton cared for in historical work was, above all, to treat the facts justly, to see things not merely on the side that is external and superficial and therefore transitory, but in their fuller and more enduring significance. It is out of a feeling of respect for this characteristic of his life and writing that I have selected for my subject "The Meaning of Truth in History."

Analogy with Art.—But the subject is full of difficulty. As decade succeeds decade we in this country are learning more and more, in science, in art, and in religion alike, that the question, What is Truth? is a question of far-reaching significance, a significance that seems to reach farther the more

[1] Creighton Lecture delivered at University College, London, on March 6, 1914, the Right Hon. Sir Edward Grey, Bart., K.G., His Majesty's Principal Secretary of State for Foreign Affairs, in the chair.

we reflect. And the perplexity of the question extends not least to the case of the historian. For it seems to-day that the genuine historian must be more than a biographer or a recorder. The field of his inquiry cannot be limited by the personality of any single human being, nor can it be occupied by any mere enumeration of details or chronicle of events. A great man, such as Cæsar or Charlemagne, may stand for a period, but his personality is, after all, a feature that is transitory. The spirit of the age is generally greater and more lasting than the spirit of any individual. The spirit of the age is also more than a mere aggregate of the events that a period can display, or than any mere sum of individual wills. What then is to be the standard of truth for the historian? The analogy of the artist who paints a portrait may prove not without significance for the answer to this question. The great artist does not put on canvas a simple reproduction of the appearance of his subject at a particular moment; that is the work of the photographer. Art, in the highest sense, has to disentangle the significance of the whole from its details and to reproduce it. The truth of art is a truth that must thus be born again of the artist's mind. No mere narration of details will give the whole that at once dominates these details and yet does not exist apart from them. But art, with its freedom to choose and to reject, selects details and moulds them into a shape that is symbolic of what is at once ideal and real. In art thought and sense enter into the closest union, or rather they form an entirety within which both are abstractions from an actual that does not let itself be broken up.

Limitations of the Analogy.—Now the historian surely must resemble the portrait painter rather than the photographer. The secret of the art of a Gibbon or a Mommsen seems to lie in this, that they select their details, select those that are relevant and that can be moulded into a characteristic setting without sacrifice of integrity or accuracy, a setting which is typical of a period. At some point or other we may want to have the details which have been passed by. We may want them for a picture of the period under another aspect. But we do not always want all the details. "Le secret d'ennuyer c'est tout dire." Carlyle passed much by when he wrote his French Revolution, and it is well that he did. We find what he left alone in other historians who present the story from a different standpoint. Just as there may be several portraits, all of superlative excellence, while differing in details and even in their presentation of actual features, so there may be several histories, equal in value, but differing in a similar fashion. To judge, then, of excellence in the historian we must possess a standard not wholly dissimilar from that by which we judge of excellence in the artist. In the case of the artist there can be little doubt about one point at all events in that standard. Whether it is nature or man that he presents, the image must interpret character. It does not detract from the truth of the work of the artist that the cottage and the figures in his landscape never existed exactly as he has painted them, or even at all. What is important is that they should suggest the deeper and more enduring meaning of what is actual, in the fullest and most important sense.

The expression which the portrait painter has put on canvas may be a rare one—the expression, perhaps, of an individuality seized at a unique moment of existence. But all the more does that expression stand out as the truth about the real life of the man whose portrait is there. Now the historian also is concerned with what is ideal. He is concerned with this just because it is only through the ideal that what has happened can be lifted above the particularity of the events that obscure its meaning. M. Renan has put this point admirably:

> Il n'y a guère de détails certains en histoire ; les détails cependant ont toujours quelque signification. Le talent de l'historien consiste à faire un ensemble vrai avec des traits qui ne sont vrais qu'à demi.

And again:

> L'histoire pure doit construire son édifice avec deux sortes de données, et, si j'ose le dire, deux facteurs ; d'abord, l'état général de l'âme humaine en un siècle et dans un pays donnés ; en second lieu, les incidents particuliers qui, se combinant avec les causes générales, ont déterminé le cours des événements. Expliquer l'histoire par des incidents est aussi faux que de l'expliquer par des principes purement philosophiques. Les deux explications doivent se soutenir et se compléter l'une l'autre.[1]

The work of the historian and that of the artist seem to be so far analogous. Both are directed to finding the true expression of their subjects. Neither is concerned with accidents of detail that are fortuitous. But the analogy extends only a little way, for the subjects are very different. That of a portrait is after all a single and isolated personality. It is the business of the artist to express this personality, and to express it as a work of art in which thought and feeling are blended in a unity that cannot be broken up. But the historian is not concerned with any single personality. His work seems rather to be to display the development of a nation or of a period, and to record accurately, and in the light of the spirit of the nation or period, the sequence of events in which its character has manifested itself. Like the artist, the historian may omit many details. But he does not possess the freedom of the artist. What we ask from the great painter is his interpretation of a personality, and he may take liberties in imagining costume and background. Indeed, he often must take liberties, for the expression counts for more than circumstances which obscure rather than assist in revealing it. But the picture created by the historian, though it, too, can only be created by his genius and must be born of his mind, is of a different order. The presentation of the whole and his description of actual facts are here more closely related. Literal accuracy counts for much, for others than himself will claim the liberty to refer to his book for actual facts, and to interpret them, it may be, differently from his rendering. Thus the historian is under restrictions greater than those of the artist. If he uses as complete a liberty as the artist claims, he is reckoned as belonging to quite a different profession, that of a writer of historical romance, such as the romances of Sir Walter Scott.

[1] *Vie de Jésus*: Préface de la treizième édition.

The Genesis of Events and Institutions.—But this is not all. The artist depicts as what is characteristic an expression that may have been found only at one moment in the history of his subject. The historian has to present events and their meaning over a period that is often long. Even occurrences that seem isolated, like the execution of Charles I., or the taking of the Bastille, or the battle of Waterloo, have to be shown as culminating events in a course of development which must be recorded because apart from it they lose their significance. It is only by tracing the genesis not merely of culminating events but of national institutions, and by exhibiting them as the outcome and embodiment of the genius of the people to whom they belong, that in many cases they can be made intelligible. This principle is the foundation of the historical method. It is a principle which to-day seems almost a commonplace, but it has not always been so. It is striking to observe how really great writers suffer when they violate it. Some extreme instances are to be found among the historians of Jurisprudence. I will take two cases of the kind, and I offer no apology for turning aside for a moment to the highly specialised branch of history from which I take them. For they are admirable examples of the fault in method which I wish to illustrate. Moreover, I am a lawyer whose almost daily duty it is to ascertain the reasons why the law has become what it is, because unless I can do so I am bound to fail in the interpretation of its scope and authority. There has thus been forced on me direct experience of the embarrassment which the fault of which I am speaking causes. Those who have to consult almost daily otherwise great books dealing with the history of legal institutions encounter this fault in its worst form.

Bentham's Lack of Historic Sense.—I will refer first to the shortcomings of a really remarkable Englishman. The case of Jeremy Bentham is notable. He ignored the light which history had to throw on the institutions about which he was writing, and his reputation thereby suffered. He rendered great services to the cause of law reform in England and elsewhere by the force of his destructive criticism. The very abstractness of his methods added to the incisiveness of this criticism. But when he describes, and even where he brings an indictment that is obviously true, he is, generally speaking, utterly defective as an historian. His unconsciousness of the genesis of the facts with which he is dealing is extraordinary in a man of such acuteness. He attributes the continued existence of bad laws to the unscrupulousness of contemporary rulers and judges, as if they had individually devised them. When, for example, with admirable insistence, he denounces the existence of the rule which, contrary to what we now regard as plain common sense, used to prevent a party to a suit from giving evidence in it, he is apparently unconscious of the fact that there was once a stage in the evolution of public opinion at which it was inevitable that the rule should be what it was.[1]

[1] See his remarks on Blackstone and the Judges in his *Rationale of Judicial Evidence*, Book ix. c. 5 (vol. 7 of Bowring's Edition of his works).

While religious opinion dominated in matters secular it was almost universally held that to allow an interested party to give evidence on his own behalf was to tempt him to perjury, and perjury, which meant everlasting damnation, seemed to our forefathers a more disastrous result than the loss of property. It was in such a period quite natural that public opinion should prefer spiritual safety to secular justice, and fashion law accordingly. We have to understand that this was so, if we would understand the history of the rules which restricted the admission of evidence in the Courts of England. That we have now passed to a different standpoint does not lessen the necessity. Bentham again, to take another example, denounced the Roman law as being a parcel of dissertations badly drawn up! He knew nothing of its history or of the circumstances of its development. He had not heard of the work of the great historical school of Roman law which Savigny was even then leading. His method was always to assume certain abstract principles, and to judge everything in their light without regard to time or place. He insisted on immediate codification, just as Savigny, on the other hand, insisted on the postponement of codes until the common law had completed a full course of natural growth.

Savigny.—But Savigny himself, to take my second illustration, at times incurred the perils which are inseparable from occasional lapses into abstractness of mind. Although he was an apostle of the historical method and in general took far more account of history than did Bentham, he, too, at moments made what to a later generation have become mistakes. For example, he attacked the code which Napoleon had enacted for France. He attacked it on the ground that to enact such a code was unscientific.[1] He was probably right in desiring that the spirit of the great Roman lawyers should continue, at least for a time, to work throughout Germany, where it held sway, unobstructed by the rules of a rigid code. In that country, where the tradition of the Roman law actually occupied the field, the provisions of a code might well have proved not only unduly rigid but also artificial. Yet his attack on Napoleon's great code did not do justice to the overwhelming reasons for enacting it in France. France, unlike Germany, had before Napoleon's time no general body of laws. The different parts of the country were subject to utterly divergent systems, such as were the Customs of Paris and of Normandy. It was remarked by Voltaire that a man travelling in France in his own time changed laws as often as he changed horses. The rough common sense of Napoleon saw that a general code was a necessity. He framed one that was not ideal, judged by the high standards of Savigny, but it was the best he could frame at a time when nothing was to be hoped for in the way of development on the basis of the prevailing laws. Gradual reform of this kind might well have been possible had the Roman law been the general foundation of a single system of jurisprudence in France.

[1] See the section headed "Die drei neuen Gesetzbücher," in his book *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft.*

But it was not so, and Napoleon therefore took the course which the necessities of the time dictated.

Context of Historical Events.—I have cited these examples of the desirability of the historical spirit in estimating legal institutions, partly because they illustrate admirably the truth of the saying of Balduinus, a great jurist of the sixteenth century, "Sine historia cæcam esse jurisprudentiam." But I have cited them also because they illustrate the wider proposition that no event in history of any kind can be judged without full knowledge of its context and of the spirit of its particular age. The execution of Charles I. has been the subject of the hottest controversy. Did the tribunal which decreed it sit wholly without constitutional warrant, and was the trial conducted quite illegally? Probably both questions must be answered affirmatively from the standpoint of the common law. But this does not conclude the discussion. It is true that acts of the kind that is revolutionary are outside the provisions of ordinary law. And yet they may be justified under what is called martial law but is in our country only an application of the maxim "Salus populi suprema lex." Had Cromwell not put Charles to death, it was more than merely possible that Charles would have seized the first chance of putting Cromwell himself to death and of upsetting the new order of government. As Lord Morley, in his *Life of Cromwell*, has pointed out, the real justification of Cromwell must depend on the question whether what can only be justified as an act of war was or was not a public necessity. And the answer to this question requires that the problem should be approached as a large one, and in the spirit which demands a survey of the events of the periods both before and after the year 1649. The judgment of posterity upon the act of Oliver Cromwell must turn, not on what he was as an individual, but on the extent to which he was the representative figure in a movement which must be judged before he can be approved or condemned.

Control of Details.—Now it is just this obligation of the historian that makes his work so difficult. Like the portrait painter, he has, in his search after expression, to select details, but he has to select them under far more stringent conditions as to completeness and accuracy. Exact these details must be, but complete they cannot be. Much must be rejected as irrelevant. The test of relevancy is the standard of what is necessary, not merely for exactness, but for the adequate portraiture of the spirit of the time. And this test necessitates great insight into the characteristics of that spirit. Otherwise misleading details will be selected, and undue prominences and proportions will be assigned. The historian must be able to estimate what are the true and large characteristics of the age, and one test of his success will be, as in the case of the artist, the test of his stature. Can he rise high enough to present the truth in what, almost as it were by direct perception, we seem to recognise as a great form of deep significance? I say almost by direct perception, for the analogy of the intuition of art and literature appears to come in here. One recognises the quality of size in a Gibbon or a

Carlyle as one recognises it in the great portrait painter and the great dramatic poet. But in the domain of history the predominance of this quality is conditioned by the imperative duty to be accurate to an extent that is incumbent neither on the painter nor on the poet. The historian who has a whole period to describe must be more than exact; he has to be lord over his details. He must marshal these details and tower above them, and reject and select in the light of nothing less than the whole. He must not let his view of that whole, as has been the case with both a Bossuet, on the one hand, and a Buckle, on the other, be distorted by *à priori* conceptions that are abstract and inadequate to the riches of the facts of life. He must frame his estimate after a study of the whole sequence of events, of those events which throw light on the conduct and characteristics of a nation in the variety of phases in its existence. It is just here that he is apt to be beset by obsessions that come from unconscious pre-judgments.

Scientific Method of Historical Study.—I wish to try to say something about the origin of this kind of temptation to pre-judgment, a temptation to which a long list of historians have succumbed in a greater or less degree. Indeed no one can wholly escape it. But it has various forms, some of which are worse than others. In those that are most misleading it seems to arise from an insufficiently considered application of the conceptions under which the observer searches after facts, conceptions which are often too narrow for the facts themselves. It appears as exactly the same kind of temptation as that into which in various forms students of the exact sciences have been prone to fall. I will therefore ask you to bear with me while I touch on the general subject of scientific method. For in every department of science just the same difficulty arises as arises in that of the historian, and the source of these difficulties in some branches of science can be easily traced. Facts are apt to be distorted in the mind of the observer by pre-conceived hypotheses of which he is hardly conscious. The attempts which have been made to exhibit the life of an organism as the result of physical forces operating from without on an aggregate of minute mechanisms or chemical compounds, have, notwithstanding their usefulness from the point of view of physics and chemistry, fallen short as regards the nature of life itself. When we are confronted with the unquestionable facts of reproduction and heredity these attempts have always broken down. We are driven to admit, not the existence of a special vital force controlling development from without, but the conception of something in the nature of an end realising itself, a whole which exists only in what it controls, but which, while it may still fall far short of conscious purpose, is not on that account less real. We may indeed dislike expressions which suggest abstract or even conscious purpose, and prefer, with the author of that remarkable book, *Creative Evolution*, to speak of what is realised as a tendency rather than an end. But one thing is clear however we may express ourselves. We must not let the terror of theology and the supernatural which often afflicts men of science with fears

deflect us from our duty to be true in our descriptions to actual experience, and drive us by way of reaction into purely mechanistic theories which are inadequate to explain it. The history of biology seems to have been at times as sad an illustration of the dangers of anti-theological dogmas as it has at other periods been of the dangers of those of a theological teleology.

Absence of Prejudice.—In the same way if we would know the truth about men and affairs we must learn to study their history quite simply and with minds as free as we can make them from prejudice. Our preconceptions generally arise from our having unconsciously become metaphysicians. We do not need to be metaphysicians at all, except to the modest extent of knowing how to guard against falling without being aware of it into bad metaphysics. Unconscious prejudice is apt to tempt us to deny the reality of much of the world as it seems, and seek to stretch that world on the rack of some special principle of very limited application. The only way of safety is to train the mind to be on the watch for the intrusion of limited and exclusive ideas. If to yield to such intrusion is dangerous in the field of biology, the danger becomes still more apparent when we are confronted with the phenomena which belong to the region of human existence. We can neither deny the reality of the moral and intellectual atmosphere in which as persons we live and move and have our being, nor resolve it into the constructions which represent the utmost limits attainable by the mathematical and physical sciences. Of all that really lives Goethe's well-known criticism appears to be true :

> Wer will was Lebendig's erkennen und beschreiben
> Sucht erst den Geist heraus zu treiben,
> Dann hat er die Theile in seiner Hand,
> Fehlt leider nur das geistige Band.

In truth the warning which Goethe gave to the biologist of his time is not less important for the student of history. The latter, also, must refuse the injunctions to limit his outlook which come from the materialist, and he must refuse not less sternly the counter-materialism of those who would seek in the events of the world only for the interference and mechanical guidance of a power operating from without. He must recognise, too, the reality of social wholes outside of which individuals cannot live, social wholes which are actual just in so far as the individuals who compose them in some measure think and will identically. For apart from his social surroundings the individual appears to have no adequate life. Such social wholes cannot be satisfactorily described in biological language. The practice of attempting to so express them is a very common one. People talk of social organisms and their development by means of natural selection. But in speaking of the organisation of society and of its development we have passed into a region where the categories of biology are not adequate. In this region we only darken counsel by using phrases drawn from the vocabulary of a branch of know-

ledge that does not take account of conscious purpose and of the intelligence and volition which are characteristic of persons as distinguished from organisms. No doubt human beings are organisms. But they are also much more than organisms. The biological method in history and sociology is therefore unsatisfactory. It may be and sometimes must be used, just as are the methods of physics and chemistry in biology itself. But its application ought always to be a restricted and guarded one, because, if the application is made uncritically, the reality of much that is actual in present and past alike will inevitably be ignored. Darwinian methods and conceptions avail here only to a very limited extent. For the social wholes with which history has to deal are conscious wholes representing intelligence and volition.

And this is why the historian is not only at liberty but is bound to recognise in the spirit of an age something of which he can legitimately take account. It is also the reason why he can never be a mere recorder, and why he must always be a man of Art as well as of Science. For Art alone can adequately make the idea of the whole shine forth in the particulars in which it is immanent, and this is as true of the history of a period as it is of a moment in the life of a man.

Combination of Art with Science.—In saying these things I am far from suggesting that the historian should become a student of philosophy with a view to having a standpoint of his own. I have touched on the topic for a directly contrary purpose. I am anxious that he should not unconsciously commit the fault of a Bossuet or a Bentham or a Buckle by slipping into a philosophical attitude without knowing it. It may well be that he cannot avoid placing himself at some particular standpoint for the purposes of his review. Most historians seem to me to do so to a greater or less degree. What I am concerned about is simply to make it plain that the choice of such a standpoint is no easy matter, or one that a man dare lightly adventure. And I have said what I have simply for the purpose of laying emphasis on the need, in making such a choice, of knowledge of the alternatives and consciousness of the magnitude of the field of controversy. The historian has to approach the records of the experience of nations with a mind sufficiently open to enable him to attach weight to every phase of that experience. His conception of it must be sufficiently wide to enable him to take account of every aspect which he may encounter. He must exclude neither rationality nor irrationality. Now if experience thus conceived be the material on which the historian has to operate, his method cannot be either to search for and record isolated facts which can never really be interpreted apart from their context, or to set out abstract principles. The very width of his field of research must necessitate the selection of his facts and their relation to each other and to the particular system in which alone they have their meaning. For meaning is the foundation of system in history. The sense of this, and the extraordinary difficulty which the historian has in determining what is relevant and what is not relevant to a true interpretation, has caused some

critics to despair of history and others to try to confine its task in a fashion which, if strictly carried out, would deprive the historian of the chance of calling to his aid the method of the artist. It is interesting to observe to what lengths these two divergent tendencies have been carried.

Perils of Archivial Research.—I will refer first to the criticism which rejects the possibility of reliable history altogether. In his *Farbenlehre* Goethe makes an observation on the value of exact records. "We are told," he says, "to look to the spirit rather than to the letter. Usually, however, the spirit has destroyed the letter, or has so altered it that nothing remains of its original character and significance." He puts the same thought in another fashion when he makes Faust say to Wagner, in an often quoted passage:

> Mein Freund, die Zeiten der Vergangenheit,
> Sind uns ein Buch mit sieben Siegeln;
> Was ihr den Geist der Zeiten heisst,
> Das ist im Grund der Herren eigner Geist
> In dem die Zeiten sich bespiegeln.

This seems a highly sceptical utterance. The historian is told that he can succeed neither in recovering the spirit of the past nor in discovering its letter. And if the historian were faced with the dilemma Goethe puts to him, his case would indeed be a difficult one. But is it so? Let us look at the case of records. Goethe was no doubt right in his scepticism about mere records. For if a man indulges himself with the belief that in quoting records accurately he is collecting the truth about the history of a period, he is indulging himself rashly. What do such records consist of? Biographies, written at the time, letters, and State papers are their main forms. As to the biographies, they are often valuable as presenting a fine portrait of their subject, and the narrative and the correspondence quoted are of course of much use. But they are almost invariably coloured. The selection of material is necessarily dependent on the object with which the selection is made, and that is the biography of one man. You have only to read another biography, that of his political rival, in order, if they were both famous men, to realise that whatever value the story possesses as portraiture it is by no means to be relied on implicitly for a scientific record of the facts. Lord Morley, in his *Notes on Politics and History*, quotes Bismarck on this point. Reading a book of superior calibre, that remarkable man once came (so Lord Morley tells us) on a portrait of an eminent personage whom he had known well. "Such a man as is described here," he cried, "never existed. It is not in diplomatic materials, but in their life of every day that you come to know men." So, remarks Lord Morley, does a singularly good judge warn us of the perils of archivial research.

Letters.—As to isolated letters, there again colour is inevitably present. The writers, however intimately acquainted with the facts, are too near to see them in their proper perspective. From their correspondence many fragments of solid and useful fact may be extracted; but the bulk of what is there is, taken by itself, unreliable material for the historian. It is only by careful

selection from a variety of sources, and by recasting—that is, by following the method of Art rather than that of Science—that he can produce the true expression of the period as a living whole.

State Papers.—State papers, again, are written by Ministers or by diplomatists, or more often by their officials under somewhat loose inspiration. They embody the view of the moment. Their value is mainly a passing one. They may contain documents of more than passing value, treaties or agreements or plans which have subsequently been translated into action. But as material out of which a scientific and lasting account of the facts can be reconstructed, they suffer from inevitable because inherent defects. Ambassadors' letters and the letters written to them are documents in which the impressions of the moments are recorded, impressions which are very often evanescent. Such documents are, from the circumstances in which they are composed, almost always fragmentary and incomplete. In public life the point of view is constantly changing. If a hundred years after this an historian, desiring to describe the relations between Great Britain and Germany, or between the former country and France, in the commencement of the twentieth century, were to confine himself to the State papers of particular years he would be misled. He would see little to explain the rapid evolution and change that had taken place within a very brief period. Nor could he ever discover the traces of almost imperceptible and rarely recorded influences and incidents which had stimulated the development. This is true of the evolution of policy at home as well as abroad. Speaking with some knowledge of what has gone on from day to day during the last eight years of the public life of this country, my experience has impressed me with a strong feeling that to try to reconstruct the story from State papers or newspaper accounts or letters or biographical sources would be at present, and must for some time remain, a hopeless attempt. And I know from my conversations with men of still longer and greater experience that they hold this view as strongly as I do. The materials so afforded must be used at a later period by a man who possesses the gifts requisite for presenting the narrative as that of an organic whole, and that organic whole must in its expression be born afresh in his mind. So only will he present a picture of what actually happened in a period of history. The historian will fail hopelessly if he seeks to be a mere recorder. For the truth about the whole, the expression of which is what matters, was not realised in its completeness until time and the working of the spirit of the period had enabled the process developed in a succession of particular events to be completed. It is a mistake to suppose that statesmen are always conscious of the ends which they are accomplishing. It is not by the piecing together of mechanical fragments, but by a process more akin to the development of life, that societies grow and are changed.

Selection of Facts necessary for Truth.—There is thus, if I am right, an inevitable element of what seems at first sight to be unreality in even the best work of historians. But this need not discourage us if our notion of reality,

and therefore of our standard of truth, is something more than the mere correspondence of isolated images and facts. If the test of truth in history must be the presentation of an expression, true at least in the sense in which we use the word about a great portrait, then the recording of the chance fragments of isolated facts which alone have survived for us is quite inadequate to the fulfilment of the test. All the historian writes ought to be true in the sense of being a faithful and accurate account of what has happened. But that does not mean that he should record every detail of what has happened. If he tries to do this he will lose both his real subject and himself. His business is to select in the light of a larger conception of the truth. He must look at his period as a whole and in the completeness of its development. And this is a task rather of the spirit than of the letter. Those who furnish him with the materials have not, and cannot have, the insight which is requisite for him, if he is to be a great historian of reality. And yet, of course, their work if it is well done is indispensable. It is indispensable, only it is not history until it has been refashioned in the mind of the historian. When a really competent historian has done this we may fairly think, Goethe's scepticism notwithstanding, that real history is possible inasmuch as we see before us the picture of the spirit of the past.

History as a Science.—I now turn to a second form of criticism, that which would reject as inadmissible the intrusion of art into the domain of history. Two well-known authorities on its study, M. Langlois and M. Seignobos, some fifteen years ago published a joint book for the purpose of warning their students at the Sorbonne what the study of history ought not to be. It was in effect an essay on the method of the historical sciences. It is interesting to observe the result at which they arrived, for this result shows the difficulties into which any one is bound to get who adopts their conception of the subject. Broadly stated, their conclusion is that while up to about the middle of last century history continued to be treated as a branch of literature, a change has now taken place, and scientific forms of historical exposition have been evolved and settled, based on the general principle that the aim of history must be, not to arouse the emotions or to give moral guidance, but to impart knowledge pure and simple. They admit that for many form still counts before matter, and that consequently a Macaulay or a Michelet or a Carlyle continues to be read, although he is no longer on a level with current knowledge. But such writing is not, according to them, history proper. What is justified in the case of a work of art is not justified in a work of science. And the methods of the older historians cannot, they therefore hold, now be justified. Thus, they say, Thucydides and Livy wrote to preserve the memory and propagate the knowledge of glorious deeds or of important events, and Polybius and Plutarch wrote to instruct and give recipes for action. Political incidents, wars, and revolutions were in this fashion the main theme of ancient history. Even in our own time they think that the German historians have adopted the old rejected habits. Mommsen

and Curtius they instance as authors whose desire to make a strong impression has led them to a certain relaxation of scientific vigour. Speaking for myself, I should not have been surprised had they, on the assumption that their severe standard is to be adopted, put Treitschke in particular into the pillory, for he was a very great offender against their precepts. According to them history ought to be in the main a science and not an art. It is only indirectly that it should possess practical utility. Its main object should be accuracy in recording. It consists only, so they say, in the utilisation of documents, and chance therefore predominates in the formation of history, because it is a matter of chance whether documents are preserved or lost. But they admit that the work of the historian cannot be limited by the bare documentary facts which he collects himself. To an even greater degree than other men of science he works with material which is to a large extent collected by others. These may have been men who devoted their energies to the task of search and collection, whose work has merely been what is called "heuristic." Or they may have been previous historians. The point is that, as the knowledge of the historian is only partially derived from his own direct research, his science is one of inference rather than of observation.

Combination of Art and Science in History.—It is a corollary from the view of truth in history which I have just been quoting that it should reject, not merely all efforts to look for the hand of Providence as the interpretation of human development, but also the attempts which have been made in philosophies of history to see in it the evolution of forms of mind. Bossuet and Hegel come alike under condemnation. "On ne s'arrête plus guère aujourd'hui à discuter," says M. Seignobos, "sous la forme théologique la théorie de la Providence dans l'histoire. Mais la tendance à expliquer les faits historiques par les causes transcendantes persiste dans des théories plus modernes, où la métaphysique se déguise sous des formes scientifiques." Now there is no doubt much to be said for the resolute spirit in which the two professors of the Sorbonne set themselves to eliminate all prejudices and theories and methods which can distract from impartiality and exactness of description. But their own admissions, as I have just quoted them, about deficiency in material, and the impossibility of history being a science of pure observation as distinguished from inference, deprive their protest of a good deal of its value. Without going so far as Goethe went in his scepticism about records, it is plain that the business of selection must bulk largely in every historical undertaking. And that is why, while rules as to historical evidence such as the two authors lay down are of use and should be adhered to wherever it is possible, the historian who confined himself within what alone these rules allow would produce little or nothing. The necessity of artistic selection from materials which are admittedly imperfect, not to speak of the personal equation of the writer, would make a history founded on merely scientific methods a mockery. History belongs to the region of art at least as much as it does to that of science, and this is why, *pace* M. Seignobos,

we shall continue to delight in Michelet and Macaulay and Carlyle, and to insist on regarding their books as among the world's most valuable records. They are presentations by great artists of the spirit of a period, and the artists are great because with the power of genius they have drawn portraits which we recognise as resembling the results of direct perception. Genius has been called the capacity for taking pains that is infinite, and these men have taken immeasurable pains and have been inspired by a passion for truth according to their lights. Of course they have selected and refashioned the materials which through close research were first collected, as great artists always must. Doubtless, too, there are aspects which they have left out or left over for presentation by other artists. But portraits may, as we have seen, vary in expression and yet be true, for the characteristic of what is alive and intelligent and spiritual is that it may have many expressions, all of which are true. With what is inert and mechanical it is for certain purposes different, but what is inert and mechanical is the subject neither of the artist nor the historian. It is because they let themselves go in bringing out the expression of life and personality that we continue to cling to Gibbon and Mommsen. Their problem is to display before us the course of the lives of men and of nations. Men and nations cannot be estimated through the medium of the balance and the measuring rod alone, nor are these the most important instruments for estimating them. The phenomena which belong to the region of the spirit can be interpreted only through the medium of the spirit itself. We cannot interpret by mechanical methods a play of Shakespeare or a sonata of Beethoven. In the regions of life and personality the interpretation must come through life and personality, and the mind recognises the truth of their interpretation when it recognises in it what accords with its own highest phases. History is not mere imagination. It must always rest on a severely proved basis of fact. But no mere severity of proof will give the historian even this basis. The judgment of truth implies a yet higher standard of completeness and perfection.

Truth as Result of the Combination.—I am therefore unable to agree with those who think that history must be either exclusively a science or exclusively an art. It is a science to the extent to which what are commonly known as scientific methods are requisite for accuracy and proper proportion in the details used in the presentation. But the presentation must always be largely that of an artist in whose mind it is endowed with life and form. Truth in history requires, in order to be truth in its completeness, that the mind of the reader should find itself satisfied by that harmony and sense of inevitableness which only a work of art can give. Abstractness of detail and absence of coherence offend this sense of harmony and so offend against truth by incompleteness of presentation. The reader feels that the facts must have appeared, at the period in which they did really appear, in a fashion quite different. Unless the history which he reads gives him something of a direct sense of the presence of the actual, his assent will be at the most what

Cardinal Newman called notional as distinguished from real. To define the meaning of truth in history thus becomes a problem that is difficult because it is complex. But this at least seems clear, that some notions about this meaning that have been current in days gone by, and are still current, ought to be reconsidered. A clear conception of first principles is essential in most things, and not least in the writing of history. If I have succeeded in rendering plain to you the reasons which make me feel this need strongly, I shall have accomplished all that I ventured to hope for on the present occasion.

THE RECOGNITION OF JEWISH LAW IN PRIVATE INTERNATIONAL JURISPRUDENCE.[1]

[*Contributed by* NORMAN BENTWICH, ESQ.]

The Ancient Jewish Law.—In the great mural painting representing "Law" which Mr. Sargent has painted for the Boston Library the chief place is taken by Moses, who is depicted as the supreme law-giver. And it is characteristic of Judaism, as of Mohammedanism, that it comprehends within its religious doctrine a complete system of personal, civil, and penal law. That system, which is primarily based on the prescriptions to be found in the Mosaic books of Exodus and Deuteronomy, is developed in the Rabbinical literature known as the Talmud, which was in process of formulation between the beginning of the Christian era and the seventh century. A considerable part of the Talmud consists of an elaborate discussion of the rules of the civil and personal law, which may be compared in its matter, if not in its form, with Justinian's Digest of the Roman Law. In the mediæval period, which for the Jew, who did not have to pass through a Dark Age, stretches from the eighth century almost to the present day, the need was felt for a more concise and summary statement of the law than the Talmud provided, and accordingly the great rabbis from time to time compiled legal codes, which obtained general acceptance by reason of their intrinsic excellence without the intervention of any legislative authority. It was from Spain that some of the most celebrated of these codes derived; and the author of the most authoritative of all, Moses Maimonides, was born at Cordova, though his work was written in Egypt. Spain was at that epoch the principal Jewish law-making centre, and the codes of the Spanish-Jewish sages are still in force throughout Eastern Jewry. The mediæval summaries of Jewish law cover the whole field of jurisprudence; for although in practice the personal law alone could be applied by the Jewish jurisdictions, the study of the whole system continued to form a main part of education. In modern times it is only the personal law which has a practical interest for the lawyer. The rabbinical tribunal, which operates either as a recognised court of arbitration or by the mere consent of the parties, may be called upon to apply the Jewish rules as to civil damage or prescriptive title, but its decisions on such topics do not fall within the

[1] A paper read at the Madrid Meeting of the International Law Association in September 1913.

purview of national courts. On the other hand, the Jewish rules as to marriage, divorce, and succession on death have often to be considered by the courts of different countries, and not infrequently give rise to difficult questions of jurisdiction and conflict of laws. The recognition of a separate Jewish personal law varies in degree among the nations, according as they have or have not made a complete cleavage between the religious and the secular law of their own system. Where that cleavage exists, as in France, the Jewish law has no application to Jews who are subjects of the country; where, on the other hand, questions of the personal status are wholly determined by the law of the religious community to which the individual belongs, as in Moslem countries, the Jewish law is recognised as a system having equal validity with that of the dominant religious body, and Jewish courts for the administration of that law are authorised by the sovereign power. Lastly, in countries such as England and Austria, which, while secularising the greater part of their legal institutions, have yet retained some vestiges of the religious regulation of the laws of marriage and succession, the Jews are recognised to a limited degree as a separate legal community. It is these differences of standpoint which give rise to interesting problems of private international law, the more frequently because the Jews are, so to say, more mobile and change their domicile and allegiance more readily than other peoples. The tribunals of countries which do not recognise Jewish law for their own subjects may give effect, nevertheless, to the Jewish system in dealing with cases of persons who are subjects of countries where that system is admitted. Adopting a kind of internal *Renvoi*, they may apply the Jewish law as that, which the national law controlling their decision, designates in the particular case.

Jewish Law in England.—In England the direct recognition of Jewish law is now reduced to a very small sphere: the form of marriage. The peculiar formalities of the betrothal and the placing of the ring on the bride's finger before witnesses, which constitute a Jewish marriage, are recognised as substitutes for the publication of banns and the presence of a clergyman. Statutory provision is made for Jewish marriages by the Marriage Act of 1836 and the Marriage Registration Act of 1856, but these enactments are designed principally to introduce a simple form of registration of marriages celebrated in the synagogue. Apart, however, from the express declaration of the validity of Jewish marriages by statute, there are authoritative cases establishing their validity by the common law. The greatest of English international jurists, Sir William Scott, afterwards known as Lord Stowell, upheld in two notable cases at the end of the eighteenth century the legality of the Jewish form of marriage, and went even so far as to suggest that capacity for marriage should be determined by the Jewish law.[1]

[1] Cf. *Lindo* v. *Belisario*, (1795) 1 Hagg. Consist. 216; and *Goldsmid* v. *Bromer*, (1798) *ibid.* p. 324.

In the earlier case he made an elaborate investigation of the Jewish authorities, and in adopting the opinion of the rabbis who had been consulted, he said: "If I were to determine the question of marriage on principles different from the established authorities among the Jews, as now certified, I should be unhinging every institution; and taking upon myself the responsibility, as ecclesiastical judge, in opposition to those who possess a more natural right to determine on questions of this kind."

The exceptional privilege accorded to the Jews in regard to the formal validity of their marriages is attributed by a legal writer at the beginning of the nineteenth century to "the peculiarities attending the state of the Jewish nation in England: having always been looked upon as a distinct people, and having for a long time been treated rather as aliens than as native subjects."[1] When the Jews, however, secured full civil and political equality, they still retained their privilege. But while Jewish law has been allowed to regulate the formal validity of Jewish marriages, it is now disregarded upon questions of capacity and incapacity. Thus, although Jewish law permits the marriage of uncle and niece, it has been held that the marriage of an uncle and niece, when both were domiciled British subjects and the marriage was celebrated at Wiesbaden according to Jewish custom and practice, was invalid as being prohibited by the English law (*In re De Wilton*, [1900] 2 Ch. 481). The law of the domicile determines exclusively capacity for marriages in the case of Jews as of other Englishmen. Again, though Jewish law recognises legitimation *per subsequens matrimonium*, it has been held that the subsequent marriage of Jewish parents in England in accordance with Jewish rites will not make their children already born abroad legitimate (*Levy* v. *Solomon*, (1877) 25 W.R. 842).

Limitation of Application of Jewish Law.—The rules relating to capacity and legitimacy are treated as affecting the public order, with which foreign law or religious ordinances cannot interfere. Neither a religious sect, it was said in *Levy* v. *Solomon*, nor any other self-constituted body can be permitted to set up a special personal law within the domain of a State, which would be tantamount to the assertion of an *Imperium in imperio*. Conversely, the Mosaic law, which prohibits a person from marrying a divorced woman if he belongs to the priestly caste—still maintained for certain religious purposes among the Jewish people—would not be countenanced by the English courts. Though there is no direct authority on the point, it is submitted that the general rules of English private international law, by which an incapacity of a penal or religious nature established by the laws of a foreign system is disregarded, would be applied. And within the writer's experience a case occurred where a Gibraltar Jew, who was a British subject, applied to a British consul to celebrate his marriage with a divorced Jewish woman, after the rabbi had refused to perform the ceremony on the ground that he was a

[1] Roper's *Husband and Wife*, 2nd ed. vol. ii. p. 476.

Cohen (priest). And the question of his incapacity by the religious law was not considered by the British authority.

Divorce.—What is, however, a considerable hardship in the present condition of substantive English law and of the rules of English private international law is that no regard is paid to the Jewish law of divorce in relation to Jewish marriages. Jews and Jewesses, wherever married and under whatever system of law, cannot obtain a valid dissolution of their unions if they are domiciled in England, unless the English Divorce Court grants a decree in accordance with the statute of 1857. Now that law is notorious for the very restricted grounds for divorce which it admits, whereas the Jewish law, developed as it is by the rabbis from the Mosaic prescription which gave the husband an almost unrestricted power of divorcing the wife, is extremely liberal. In addition to the grounds adopted by most modern States, the Jewish law recognises mutual incompatibility or childlessness after a certain number of years as good grounds for freeing the parties to a marriage. It is interesting to note, by the way, that Milton, who had reason to dislike the English obstacles to divorce, proposed that the Jewish law should be introduced into England, as making more truly for the well-being of the community than the rigid English system. And in the period when divorce in England could only be obtained by Act of Parliament, the validity of a rabbinical decree of dissolution of a marriage between persons of the Jewish faith was occasionally assumed. But to-day it is certain that a decree pronounced by a rabbinical authority has no legal validity here, even when the parties were married under a legal system, such as the Russian or Austrian, which entrusts questions of divorce exclusively to the religious law. Thus, in a case where a Jewish marriage was celebrated at Riga and the husband brought his wife to England and acquired a domicile here, and having afterwards obtained abroad a rabbinical divorce, he then went through the form of marriage with another woman in Scotland, it was held that this second relationship was bigamous and afforded a ground for dissolving the first tie (*Friedberg* v. *Friedberg;* see *Jewish Chronicle*, Oct. 16, 1908). In that instance no hardship was done, but there are many cases where the impossibility of obtaining a valid divorce in England according to the law under which the parties married has very harsh consequences. A Russian Jewess may be brought to England by her husband, who, perhaps, then leaves her and goes off to America. By both Russian and Jewish law she would be entitled to obtain a divorce from a rabbi, who is a doctor of the rabbinical law invested with certain legal functions; but English law would hold a decree given by him to be invalid. Insisting that it is only the country of the matrimonial domicile which can grant a divorce, it would require the injured woman to return to Russia or move on to America to obtain her freedom, which almost invariably she is unable to do. Cases have been known in which Russian rabbis, settled in England, have granted a divorce in such

circumstances in ignorance of the English law, and the divorce has been followed by a second marriage according to Jewish law. But a recommendation of the recent Divorce Commission proposes to visit such action with criminal penalties. It is submitted that it would be more equitable to accord to a responsible Jewish authority in England the right of granting a divorce in accordance with Jewish law to persons married according to that law, which divorce would be confirmed by a decree of the Court.

The policy of preserving a uniform divorce law for all persons domiciled in England is to-day, when the nation includes persons of every variety of creed and no creed, not altogether in accord with the fundamental principle of religious liberty. An exception might well be made to the principle in view of the peculiar position of the Jewish people, as has been done by the legislature in regard to the forms of marriage.

Jewish Divorce in European Countries.—In other European countries which have preserved a partial regulation of the personal status by the religious law, notably Russia and Austria, the divorcing of persons married under the Jewish law is in the hands of the rabbinical authorities; but this privilege may itself give rise to hardship when the matrimonial domicile has been changed to a country which does not pay any regard to the religious law on such matters, but which at the same time holds that jurisdiction in divorce belongs exclusively to the courts of the nationality of the parties. Thus, the French courts have refused an application for divorce brought before them by Russian-Jewish subjects settled in France, although the grounds of divorce were such as are recognised by both French and Jewish law, and although the marriage had been celebrated in France before the civil officer.[1] The wife was actually by birth a French subject, but it was held that she had obtained the Russian nationality of her husband by marriage, and had become subject to his personal law. It was declared too that submission to the local law for the celebration of marriage does not involve submission for the purpose of divorce: and that, as the French rules of private international law do not give jurisdiction in divorce to the courts of the domicile of the parties, but only to the national court, the French tribunal was incompetent.[2] The religious tribunal alone in the country of nationality could deal with the case. But the rabbinical authorities in Russia, even had access to them been open to the parties, would have been equally incompetent to give relief, because the marriage had not been celebrated according to the Jewish law. The reasoning of the French court would make the marriage of Jews born in Russia or Austria, but living in France, practically indissoluble, in despite alike of the law of the religious community, the nationality and the domicile

[1] Cf. *Rosenbaum* v. *Kahn*: Trib. Civil de la Seine; Clunet, 1912, p. 192.

[2] Similarly a Belgian court held itself incompetent to consider an application for divorce brought before it by Jewish spouses of Austrian origin (Trib. Civil d'Anvers, December 14, 1910; Clunet, 1912, p. 569).

of the parties. This is an extreme consequence of the rule as to exclusive national jurisdiction in divorce. And the legal complications that arise out of Jewish marriages provide an additional argument to those that may be derived from mere general causes for adopting generally the rules of the Hague Convention of 1902 upon marriage and divorce, which favour the grant of jurisdiction in divorce to the courts of the domicile as well as of the nationality of the parties. Wherever one only of the two bases of jurisdiction is admitted, cases of individual hardship and injustice are bound to occur.

During the last year the French tribunals have had to consider a number of applications for divorce in similar circumstances to those in *Rosenbaum* v. *Kahn*, and in every case they have held that they had no jurisdiction to grant the relief (see Clunet, 1914, p. 172 ff.). In one case, indeed, the Court declared, *obiter*, that a divorce of Russo-Jewish subjects living in France might be granted by a Jewish rabbinical authority in France, and if then transcribed in Russia, would be valid, because satisfying the requirements of the parties' personal law. But this opinion is severely criticised on the ground that the French rule which requires all divorces in France to be granted by the secular court is a matter of public policy, and cannot be infringed out of regard for a foreign personal law (see Clunet, *ib.* p. 176). French Jews, in accordance with the resolution of the *Sanhedrin* summoned by Napoleon in 1809, must obtain a divorce from the civil courts and only thereafter apply to the religious authority for the confirmation of the decree. The French tribunals have likewise held that they will not entertain a petition for nullity of a marriage between Russian-Jewish subjects who have gone through a civil form of marriage in France, on the ground that their personal statute—the Jewish law—requires a religious marriage. For it is again a matter of public policy that all marriages in France should be celebrated civilly, and this principle overrides the personal statute. On the other hand, the tribunals have granted the relief of separation to Jewish spouses married in Russia or Austria, but living in France, on the ground that they have jurisdiction in such cases unless the defendant proves that he has a domicile in another country where the relief would be granted. The principle of this decision, which is that the courts of the country of residence or domicile should take jurisdiction to grant relief in cases of matrimonial trouble, where resort to the tribunals of personal statute is impossible, might with advantage be extended to the question of divorce as well as to that of judicial separation.

Jewish Law in Austria.—In Austria, where Jews enjoy their own law of divorce, their marriages may cause a different kind of difficulty. Intermarriage between persons of different creeds is forbidden under pain of nullity; and a marriage contracted abroad by an Austrian of the Jewish faith with a Christian will be held null in Austria if it was the intention of the parties to live in the Austrian Empire. But when the parties intend to live abroad, though they should subsequently return to Austria,

there is no nullity (Clunet, 1911, p. 1296). Jewish law would regard such a mixed marriage in any case as null, but the rule of the Austrian code is not, of course, founded on respect for the Jewish law, but on general considerations of public policy.

The Jews in Mohammedan Countries.—It is in Moslem countries where we find a much more liberal and thorough admission of the Jewish personal law. In the East and in North Africa, where there is no strongly marked national life such as exists now in Europe, and where the condition of society resembles rather that of the European peoples in the Dark Ages, the doctrine of the personality of law is maintained for all questions of the personal statute. The Jews are recognised as a separate religious-national community, and their rabbinical courts are maintained side by side with the Mohammedan Mehkemeh Sharieh and the various Christian jurisdictions. From the beginning the Mohammedan powers have left their subjects free to enjoy their own personal law, and various decrees of the Sultan of Turkey have confirmed this privilege of the Jewish population of the Ottoman Empire. The Hatti Humayoun (Charter of protected subjects), which is in force to-day, was issued in 1865, and provides for the legal and administrative organisation of the community, embracing rules for the election of rabbis and lay councils, and the appointment of spiritual and administrative commissions. All questions of the personal law, legitimacy, guardianship, and succession, as well as marriage and divorce, are determined in the countries which are still subject to Turkish sovereignty by the Jewish authority thus constituted according to the rabbinical law. But of recent years there have been several interesting modifications of these privileges in those Moslem countries which have come under European control, and where the Jewish law comes into contact with different principles of public order.

French Protectorates.—The numerous Jewish population of Algiers were all declared to be French subjects by a decree of 1856, and accordingly they lost the enjoyment of the Jewish personal law, and became subject to the rules of the French civil law for all matters. The condition of the Jews in Tripoli, now an Italian province, still awaits definite regulation, but it is likely that the rabbinical courts which existed under the Ottoman *régime* will be maintained for questions of personal statute.

In Tunis the French, indeed, have largely maintained the privileges of the Jews, and in questions of marriage, succession, legitimacy, guardianship, etc., recognise the sway of the Jewish codes over those Jews who choose to be judged by their religious courts. The same treatment is to be followed in Morocco, where there is a large mass of Jews.

The decree of judicial organisation of the new French protectorate provides (Art. 4): The regulation of disputes about the personal statute and succession of Moslem or Jewish subjects of the Empire is expressly reserved to the tribunals which are competent in them at the present

time, *i.e.* the religious tribunals. The French courts will have jurisdiction exceptionally where a claim of such a nature arises incidentally in a civil case. The position of those Jews who choose to retain their special personal law by not accepting French citizenship will be very different in regard to marriage and successoral rights from that of those who are more completely Frenchified. An authoritative code of Jewish law, the *Eben Haezer* (*lit.* the Rock of Salvation), has been translated into French by a president of the civil tribunal of Algeria, and the Chief Rabbi of the Province of Oran. The first article of the code declares: "Marriage is for a man a religious and social obligation; he who does not marry is considered guilty of homicide." It is not, however, suggested that the Jewish court has power to convict a confirmed bachelor of homicide. But the French Court of Appeal for Algeria has confirmed the right of a native Tunisian Jew to have more than one wife, which is supported by the rabbinical code. The Jews of the West are bound by their Jewish as well as by their national law to be monogamous, because a famous rabbi of the eleventh century crystallised the dominant custom of monogamy into law; but some Eastern communities have not accepted this ruling. And though the French authorities may refuse to marry civilly a Jew who has already another wife, legal effect will be given to such a marriage when validly celebrated according to the Jewish form.

On the other hand, it is probable that a second marriage (*more Judaico*) will be pronounced bigamous when the first has been celebrated before a French civil officer (Clunet, 1911, p. 194). And a French court in Tunis has refused to pay regard to the Mosaic law of the levirate which renders a widow incompetent to marry until the brothers of her deceased husband have been given in turn the option of marrying her and have refused. A French tribunal, it was held, cannot sanction the personal laws of a foreign subject which are contrary to principles of public international law (Clunet, 1907, p. 756). But another tribunal in the same country subsequently gave effect to the levirate law in a case of the succession of a Tunisian Jew who died childless, but leaving a widow and several brothers. It was held that one of the brothers had become the legal husband of the widow by offering her the symbol of marriage according to Jewish law, and was thence liable for her maintenance (Clunet, 1912, p. 1180).

The European influence tends to limit the acceptance of Jewish personal law in countries where in theory it is still sovereign over matters of personal status. But in one respect the special character of that system as to marriage is allowed to derogate from the ordinary principles of the public law of Europe. It operates not only with regard to the capacity of the parties, but also in regard to the effect upon their nationality. Just as a marriage of a French or Italian woman with a native Mohammedan of Tunis does not involve the loss of the woman's nationality, because the Mohammedan system, being personal, does not impose on the wife the nationality of the

husband, so likewise it has been held that the union of a French Jewess with a native Tunisian Jew does not involve any change of national character, because by the rabbinical as well as the Mohammedan law, a wife does not by marriage change her status in that respect (Clunet, 1911, p. 194). Accordingly a Jewish Frenchwoman who has married a native Tunisian Jew or an Ottoman Jew can obtain a divorce from him before the French tribunals by the French law which continues to apply to her as her personal statute after marriage (see Clunet, 1914, p. 182).

Egypt.—In Egypt, as in the French protectorates in North Africa, the Jewish community maintains its autonomy as regards personal law, and the rabbinical courts, established in accordance with the Firman of the Sultan, continue to administer questions of succession, marriage, and divorce between native Jewish subjects. Neither the Mixed nor the Native Courts can interfere with them in these cases. Their competence has been upheld when necessary by the Mixed Tribunals which have repudiated jurisdiction, even where the parties were not all Egyptian subjects. In a case where, after a claim by a Persian Jew to a succession had been made before the Chief Rabbi and rejected, an application was made to the Mixed Tribunal on the ground that the jurisdiction of the religious courts extended over native Jews only, the application was refused because, on the one hand, the Jews of Persia are likewise subject to their rabbinical authorities and, on the other, because the original submission to the Rabbi was regarded as final (Clunet, 1910, p. 1304). The Jewish law of succession may even be applied by a Consular Court, which has jurisdiction in questions of personal status of the subjects of European States living in Egypt. Normally the consular judge determines such cases according to the national law, *i.e.* the English law, the French code, etc. But an instance occurred last year when, acting under the Ottoman Order-in-Council, the British consul determined a disputed succession by the Jewish rules. The deceased person, who had died intestate, was a protected British subject, and one of the parties claimed to be entitled under the Jewish system of distribution. As the Order-in-Council directs the judge to apply the law or customs of their religious community in the case of any parties who are not Christians, his claim was admitted. Thus a British court in the East may give effect to the Jewish personal law; and a case may be imagined in which the Judicial Committee of the Privy Council would be called upon to determine the rights of the litigants according to the dispositions of the Talmud.

The Wandering Jew.—The extent to which Jewish law is applied varies very widely from the complete adoption of it in the Orient to govern all the personal relations of native Jews, to the bare admission of it in France as a system chosen by certain foreign countries to regulate the conditions of succession, marriage, and divorce. The tendency in Europe is for the extension of the national law to cover all personal relations at the sacrifice of the privileges of special communities; but in the East, where a single

national life has not been developed, or, rather, where religion and nationality are completely fused, the principle of the territoriality of law has not yet been extended to the sphere of the personal statute and family right. And European States, when they extend their sovereignty or jurisdiction over Eastern countries, have to take account of this maintenance of personal systems of law based on religion. Each system has its advantages and its difficulties; but for the wandering Jew the doctrine of the personality of law, which assures him the same capacities and remedies wherever he may be settled, is preferable to the doctrine of exclusive national or territorial jurisdiction which often leaves him helpless to obtain any relief. And the wandering Jew suffers more perhaps than any other element of the population from the present divergence of the rules of private international law about competence in matters of personal statute; and he has therefore much to gain from a more complete adoption of the principle of domicile as the basis of jurisdiction in these matters, which would secure in each country the competence of the local tribunals over the subjects of another country, whenever the courts of the latter are not in a position to adjudicate upon the case.

NATURALISATION.

(1) NATURAL-BORN BRITISH SUBJECTS AT COMMON LAW.

[*Contributed by* F. B. Edwards, Esq., LL.B. (*Tas.*), B.A. (*Oxon.*).]

The rule of the Common Law is that all persons who are born within the protection of the Crown of the United Kingdom are natural-born British subjects. This principle is laid down in *Calvin's Case*,[1] and is the interpretation put upon that case by the Court of Queen's Bench in *Isaacson* v. *Durant*.[2] The report of *Calvin's Case* is cloaked with a confused and confusing mass of illustrations, which makes it somewhat difficult to arrive at a clear understanding of the decision that was actually given by the judges, and of the grounds upon which they based that decision. A close examination of Coke's Report, however, makes it possible to remove that cloak of extraneous matter and to lay bare the material part of the judgment; and when this is done there is no difficulty in understanding the case of *Isaacson* v. *Durant* and in showing that the two judgments are perfectly consistent with each other.

Calvin's Case.—The question before the Court in the former of these cases was whether Robert Calvin, the plaintiff, a Scottish subject of King James I., who was born after James's accession to the English throne, was an alien; the unanimous finding of the judges was that he "was no alien, and consequently that he ought to be answered in this assise by the defendants."[3]

It is important to remember that at the time when that case was decided the feudal or territorial conception of nationality was practically universal throughout the world; or, at least, that that conception was operative in both England and Scotland as far as the acquisition of the local nationality at birth was concerned.

Definition of Allegiance.—The judges appear to have arrived at their opinion in the following way. First of all they defined allegiance or ligeance as "the mutual bond and obligation between the King and his subjects, whereby subjects are called his liege subjects, because they are bound to

[1] 7 Co. Rep. 1.
[2] (1886) 17 Q.B.D. 54 (the Stepney Election Case).
[3] 7 Co. Rep. at p. 3b.

obey and serve him; and he is called their liege lord, because he should maintain and defend them."[1] Allegiance then is the tie existing between sovereign and subject; so that wherever the relation of sovereign and subject is present, the subject owes a duty of allegiance to his sovereign, and in return therefore the latter ought to afford him all possible protection. All who at their birth are under this bond of allegiance to any particular sovereign are his natural-born subjects;[2] and every natural-born subject of a given sovereign is under the obligation of allegiance to his sovereign. Now exactly what constitutes a breach of allegiance may vary under different national legal systems, but in every political society the subject members owe a duty to the sovereign and the sovereign is correspondingly liable to them. Whoever is a subject owes a duty of obedience and good faith which English law calls allegiance, and he who is born a subject of any sovereign is born under his obedience, power, faith, ligealty, or ligeance.

Subjects by Birth.—The Court then, in effect, proceeded to show whom it regarded as coming under this category of subjects by birth. According to the English Common Law all persons who were born within the protection of England, that is to say the protection exercisable by the King of England in virtue of his occupying the throne of England, and no others, were natural-born English subjects of the King. According to the Common Law of Scotland only those who were born within the protection of Scotland were natural-born Scottish subjects of the King of Scotland. All those whom English law regarded as natural-born Englishmen were under the allegiance of the King of England, and all whom Scottish law held to be natural-born Scotsmen were under the allegiance of the King of Scotland.[3]

The next step in the argument was to refute the suggestion advanced by counsel that allegiance is due to the King in his politic and not in his personal capacity. If this suggestion had been maintained after the accession of James to the English Crown, his English subjects would have been under the allegiance of James only in his capacity of representative for the time being of the corporation sole, known as the Crown of England: and similarly all Scotsmen would have been under allegiance of James as representing the Crown of Scotland. The judges, however, were of opinion that this was not so,[4] and the result of their decision was that all natural-born Englishmen and all natural-born Scotsmen were natural-born subjects of the person James who occupied the throne of both countries. And it is because

[1] 7 Co. Rep. at p. 5a.

[2] For "they that are born under obedience, power, faith, ligealty or ligeance of the King are natural subjects," *ibid.* at p. 5b.

[3] Just as all whom Servian law holds to be natural-born Servians owe a duty of allegiance to their sovereign, *i.e.* all children of Servian parentage wherever born. See Servian Civil Code, Art. 44.

[4] See 7 Co. Rep. at page 10a: see, however, *Isaacson* v. *Durant*, (1886) 17 Q.B.D. 54 where a disposition to regard allegiance as being due to the sovereign in his politic capacity is manifest. This probably indicates the modern view of allegiance.

of this, and the fact of the rules governing the acquisition at birth of both English and Scottish nationality being precisely similar, that the judges declared that "whosoever is born within the King's power or protection is no alien"[1]—that is to say, is a natural-born subject of the King.

It should be noticed carefully that the judges in giving this definition did not go to the extent of declaring all these natural-born subjects of the person for the time being occupying the throne of England to be English subjects of the King. On the contrary they were particularly careful to refrain from making such a statement, and their attitude is explained by the popular feeling existing on the point at that time. Whilst declaring that the natural-born subjects of both countries were natural-born subjects of James, they preserved the distinction between such of them as were his English subjects and such as were his Scottish subjects.[2]

Now at the time when this judgment was given the natural-born subjects of James were divisible into four distinct classes, namely, Englishmen born before and Englishmen born after his succession to the English Crown, and Scotsmen born before and Scotsmen born after that event. Those comprised in the first and third classes were the *antenati* of England and Scotland respectively; the second and fourth classes were composed of the *postnati* of England and Scotland respectively.

The last link in the chain of reasoning put forward by the judges was expressed in the sixth and last of what Coke called "demonstrative illations or conclusions," namely, "Whosoever at his Birth cannot be an Alien to the King of England cannot be an Alien to any of his subjects of England."[3] This "illation" is applicable to those only who neither are already reckoned among the King's subjects of England nor at the moment of their birth were alien to the person who then occupied the English throne. Now the only persons besides Englishmen who were not alien to James the King of England were his subjects of Scotland, and of these the *postnati* alone were born subjects of the person who at that time was sovereign of England.

The *antenati*, though they were natural-born subjects of James, were, at the instant of their birth, aliens to the Queen of England, and were therefore, unless that character had since been duly removed, aliens to all Englishmen.[4]

[1] 7 Co. Rep. at p. 25a.

[2] The frequent references throughout the judgment to the King's "subjects of England" and his "subjects of Scotland," together with the language of this demonstrative illations, make this quite clear.

[3] 7 Co. Rep. at p. 25a.

[4] "But the time of his birth is of the essence of a subject born; for he cannot be a subject to the King of England, unless at the time of his birth he was under the ligeance and obedience of the King. And that is the reason that the *antenati* in Scotland (for that at the time of their birth they were under the ligeance and obedience, of another King) are aliens born, in respect of the time of their birth": *ibid.* at p. 18a. The case ignores the possibility of some of these *antenati* and *postnati* Scotsmen being already natural-born Englishmen under some English Act of Parliament (*e.g.* 25 Ed. III. St. 2).

Robert Calvin belonged to the class of *postnati* Scotsmen, and the Court therefore found that he was no alien. The judges refrained from going beyond the statement that the *postnati* are "no aliens," and the language used throughout the report shows clearly that it was never intended that they should be regarded as Englishmen. They were put into a very anomalous position; for although they were not entitled to the special privileges nor subject to the special duties that attach to the quality of Englishmen, they were subject to none of the special disabilities which English law imposed upon the alien.

Natural-born British Subjects.—Now in our attempt to find out who are natural-born British subjects, we are bidden to apply the old Common Law of England. This application must be made *mutatis mutandis* of course, and therefore the substance of the decision in *Calvin's Case*, as applicable in this inquiry, is that natural-born British subjects at Common Law are all persons born within the protection of the Crown of the United Kingdom; and if the person wearing that Crown should at the same time be the sovereign prince over some other country, all the natural-born subjects of that other country born during the subsistence of the union of the Crowns rank as "no aliens" in the view of any British Court[1]; though the latter are not British they are entitled to enjoy all the privileges which various laws operating within the limits of the British Empire deny to aliens; but such of them as were born out of those limits, of non-British parents, seem to be subject to the disabilities enumerated in 12 & 13 Wm. III. c. 2, s. 3. Thus there may exist a peculiar class of person who is neither a British subject nor an alien.

It should be observed that according to the reasoning in *Calvin's Case* these *postnati* enjoy the benefits of "non-alienage" because they were born under the allegiance of the King of England: if by any lawful means they could have put off that allegiance they would forthwith assuredly have become aliens. As was pointed out in *Isaacson* v. *Durant*,[2] they owed that allegiance to the person who was King of England, not because he was King of England but because (in the latter case) he was King of Hanover; they were under the allegiance of William IV. who was also King of Hanover; they owed their allegiance to William and his successors according to law, being Kings of Hanover; and so, when Ernest, Duke of Cumberland, succeeded to the throne of Hanover according to law, their allegiance followed him; and as he was not also King of the United Kingdom they became aliens to the Queen of the United Kingdom, and therefore to all British subjects.

Other Classes of Natural-born British Subjects.—But it is not only children born within the protection of the Crown of the United Kingdom

[1] Cf. Piggott, *Nationality*, pt. 1 at p. 82; and *Isaacson* v. *Durant*, (1886) 17 Q.B.D at p. 65; and Cogordan, *La Nationalité* (2me édition), p. 321.

[2] (1886) 17 Q.B.D. 54.

who are natural-born British subjects at Common Law. To these must be added the children of the King wherever they have been born.[1] And then again "if any of the King's ambassadors in foreign nations have children there of their wives, being Englishwomen,"[2] that issue is a natural-born British subject. That the wife should be a British subject, if ever that were really essential, is, as Kay J. pointed out in *De Geer* v. *Stone*,[3] a quite unnecessary provision nowadays; for since the date of the Naturalisation Act, 1845, it has been impossible for the wife of a British subject to be an alien. This state of affairs seems to be based on the ambassadorial privilege of the father,[4] and therefore the child will be a natural-born British subject at Common Law only when his birth takes place within the territory in which his father exercises his official functions.

It is undoubtedly essential that the father should not be a subject of the State to which he is accredited,[5] and the language used in *Calvin's Case* suggests that the father must himself be a British subject at the time of his child's birth.[6]

It has been suggested in this JOURNAL by Mr. de Hart[7] that the suite of a sovereign in a foreign country and of an ambassador share the immunities and privileges of the principal. He wrote: "A sovereign's suite share his immunities. Therefore, although the point is nowhere referred to, it seems clear that the child of an alien member of the suite, born on British soil, while the parents are attached to the sovereign's person, is not a British subject": and "the attachés and other members of a foreign mission share the ambassador's privileges, as perhaps also do the servants of the embassy." The point however is far from clear,[8] and so far as the subordinate members of an embassy are concerned there is the *dictum* tending to the contrary of Holroyd J. in *Novello* v. *Toogood*[9] which states that "the privilege[10] is conferred by the law of nations, in order that the ambassador may not be prejudiced in his dignity or personal comfort; it is not given for the benefit of the servant."

Birth within the Protection of the King.—We have come to the conclusion that any person born within the protection of the King by virtue of his protection as sovereign over the British Empire is a natural-born British subject. We now proceed to explain the term "protection."

[1] Cf. Report of Inter-Departmental Committee on Naturalisation Laws (1901), s. 9. The authority for this statement is the Parliament Roll of 17 Ed. III. the terms of which are substantially repeated in the second statute of 25 Ed. III.

[2] 7 Co. Rep. at p. 18a.

[3] (1882) 22 Ch. D. at p. 252.

[4] *Magdalena Steam Navigation Company* v. *Martin*, (1859) 2 E. & E. at p. 111.

[5] Cf. *Novello* v. *Toogood*, 1 B. & C. at p. 564 (per Holroyd J.).

[6] Professor Dicey is of opinion that the father must be a British subject: see *Conflict of Laws* (2nd edition), p. 171, rule 24.

[7] Journal, N.S. vol. 2 at p. 13.

[8] See Report of Inter-Departmental Committee on Naturalisation Laws (1901), s. 7.

[9] 1 B. & C. at p. 564.

[10] *I.e.* freedom from local jurisdiction.

Coke's report of *Calvin's Case* declares that if an alien in amity cometh into England, because he is in England, he is within the King's protection,[1] but "if an alien enemy come to invade this Realm, and be taken in War, he cannot be indicted of Treason; for the Indictment cannot conclude *contra ligeant' suae debitum*, for he never was in the Protection of the King, nor ever owed any manner of Ligeance unto him, but Malice and Enmity, and therefore he shall be put to death by Martial Law."[2] The conclusion to be drawn from these two extracts clearly is that every person who is in England, other than "an alien enemy come to invade," is within the protection of the King of England, and that he is within that protection because he is within the King's Realm of England.[3] By the term England as here used is meant England and its dependencies, but as this domain has since become merged into the greater British Empire, the modern version of that conclusion is that every person who is within the limits of the British Empire, other than an invading enemy, is within the King's protection, and for the simple reason that he happens to be within the King's British Dominions.[4]

This idea of protection as being practically synonymous with territory has been considerably extended by the fiction of the exterritoriality of ships, a fiction which treats a ship as part of the territory of the country of her flag.[5] The extent to which the King's protection exists on board British ships will be indicated later, but for the present the general statement will suffice that, save as excepted by Coke, the protection of the King is coterminous with the British Dominions including, subject to certain limitations, British ships. It was declared in *Craw* v. *Ramsey* that "if the King of England enter with his army hostilly the territories of another Prince, and any be born within the places possessed by the King's army, and consequently within his protection, such person is a subject born to the King of England, if from parents subjects, and not hostile;"[6] but the idea that the protection conceived by the law of nationality extended into a foreign country in such circumstances was definitely denied by Kay J. in his judgment in *De Geer* v. *Stone*.[7]

[1] See 7 Co. Rep. at p. 5b.

[2] *Ibid.* at p. 6b.

[3] Cf. *Ex parte Blain, in re Sawers*, 12 Ch. D. at p. 526 (per James L.J.), which supports this conclusion.

[4] *In re Bruce*, 2 Cr. & Jer. at p. 450. Cf. Dicey, *Conflict of Laws* (2nd edition), p. 166; Westlake, *Private International Law* (5th edition), p. 382; Foote, *Private International Jurisprudence* (4th edition), p. 1; Cockburn, *Nationality*, p. 7; *Doe d. Hay* v. *Hunt*, 11 Upper Canada Rep. 367.

[5] "To this extent a ship may be said to be a part of the territory of the country of her flag . . . but so to speak of her is to employ a metaphor, and this must never be lost sight of": per Lindley J. in *R.* v. *Keyn*, (1876) L.R. 2 Ex. D. at p. 94. But "the true principle is, that a person who comes on board a British ship, where English law is reigning, places himself under the protection of the British flag": per Coleridge C.J. in *R.* v. *Carr & Wilson*, (1882) 10 Q.B.D. at p. 85. Cf. *Marshall* v. *Murgatroyd*, (1870) L.R. 6 Q.B. 31.

[6] Vaughan at p. 281.

[7] (1882) 22 Ch. D. at p. 254.

But the effect of the exception quoted from *Calvin's Case* upon the law of nationality is stated later in that case in the following terms: "If enemies should come into the realm and possess town or fort, and have issue there, that issue is no subject to the King of England, though he be born upon his soil, and under his meridian, for that he was not born under the ligeance of a subject, nor under the protection of the King."[1] On the authority of this dictum it seems clear that if the enemy has taken possession of a town or fortress, any issue there born to them is not a British subject, but it is submitted that the reason given for that decision fits equally well the case where the enemy force is merely present within any part of the British Dominions, and has not proceeded to the step of occupying any town or fortress there.[2]

It should be observed that this exception applies only to children born to such enemy force, whether it be the legitimate child of a soldier or of a male non-combatant or the illegitimate child of a female camp follower. It does not apply to other children born within the territory occupied. It is quite clear that such persons are born under the King's protection, for that protection does not cease merely because the enemy for the time being exercises the rights of an army in occupation.[3]

There is another exception to the statement that all persons born within the British Dominions are born within the King's protection. It is dependent upon the privileges of ambassadors[4] and foreign sovereigns when within the King's Dominions or even when upon British ships, enjoying the benefits of the fiction of exterritoriality.

The position of a foreign ambassador accredited to the King is precisely the same as that of a British ambassador when in the country to which he is accredited[5]; and his children are not born within the protection[6]; for he himself "is not supposed even to live within the territory of the sovereign to whom he is accredited,"[7] unless at the same time he happens to be a British subject, in which case his privileges only extend to those matters which directly relate to his ministry[8]; and since the privilege is conferred by the law of nations in order that the ambassador may not be prejudiced in his personal comfort,[9] it may reasonably be assumed that the fictional exterritoriality extends to his family residing with him. And neither would the child of a foreign sovereign

[1] 7 Co. Rep. at p. 6a.

[2] It would be more consistent with the denial just cited from *De Geer* v. *Stone* if this exception did not exist, but the difficulty of enforcing any claim to such persons as British subjects is the strongest possible argument for its retention.

[3] *De Jager* v. *A.G. of Natal*, [1907] L.R. A.C. (P.C.) 326; per Lord Loreburn, L.C., at pp. 328-9. See also *The Manilla*, Edwards at p. 3, per Lord Stowell.

[4] Cf. Cockburn, *Nationality*, p. 7.

[5] Cf. *ante*, p. 318.

[6] Cf. Report of Inter-Departmental Committee on Naturalisation Laws (1901), s. 7.

[7] Per Lord Campbell in *Magdalena S.N. Co.* v. *Martin*, (1859) 2 E. & E. at p. 111.

[8] *The Duke of Brunswick* v. *The King of Hanover*, 6 Beav. 1.

[9] *Novello* v. *Toogood*, 1 B. & C. at p. 564 (per Holroyd J.).

born to the latter whilst present within the King's jurisdiction be a natural-born British subject, for the sovereign is entitled to at least such privileges as his ambassador may enjoy.[1]

The King's Dominions.—There is little difficulty in deciding whether any particular territory forms part of the King's Dominions. It is quite clear that British Protectorates,[2] whether ordinary or colonial, and spheres of influence are not included within the King's Dominions, and that a right to occupy and administer vested in the British Government does not make British the territory affected.[3]

Nor do the Indian allied states come within the boundary of the British Empire.[4] There seems, however, no reason, beyond a purely technical one, why territories held by the British Crown under what either is, or practically is, a lease in perpetuity, should be excluded from this limit.[5] The proposition that British Protectorates, and consequently any less interest of the Crown, should be excluded from our definition of the King's protection, is supported by Sir William Anson, who declares that birth within such a region is not sufficient to found a claim for British natural-born status.[6] The real test of whether a given territory is part of the British Dominions is that it must have passed openly, completely, and unequivocally into the possession of the Crown. Difficulties sometimes occur in the case of territories to which a title based on recent acquisition of hitherto unoccupied territory or based on conquest from or cession under treaty with some foreign state, has been set up; or of countries which, it is claimed, have recently ceased to be British owing to the effect of conquest, or treaty cession, whether the latter take the form of a transfer to an already sovereign state or a recognition of the independence of a revolting colony.

The general doctrine on this latter point was laid down by Lord Stowell in the case of *The Fama*.[7] After pointing out that in order to complete a right of property there must be both a right to the thing, and possession of it, both a *ius ad rem* and a *ius in rem*, the learned judge observed: "This is the general law of property and applies, I conceive, no less to the right of territory than to other rights." It may be asserted, therefore, as a fundamental proposition, that in order to acquire a sound title to land hitherto not included within its domain a State must have both a *ius ad rem*—a right to it—and a *ius in rem*—possession of it. The *ius ad rem* invariably requires an intention to maintain an exclusive title as against all others, but the origin

[1] Cf. *The Duke of Brunswick* v. *The King of Hanover* (supra) and *The Parlement Belge* (5 P.D. at p. 207).

[2] Cf. Westlake, *Public International Law*, Part I. (Peace) c. vi.

[3] *E.g.* Cyprus, cf. Hall, *Foreign Jurisdiction of the British Crown*, p. 226 (note).

[4] Cf. Westlake, *ubi supra.*

[5] *E.g.* the lease of Wei-hai-wei from China for so long as Port Arthur is in the occupation of Russia (now Japan).

[6] *Law and Custom of the Constitution*, vol. ii. pt. ii. p. 60.

[7] 5 Rob. 115.

of what one may term the legal right varies according as the acquisition results from occupation, conquest, or cession.

A title by occupation can only be acquired over what Westlake called "new countries," which, he wrote, "when we are speaking of the title to territorial sovereignty are those in which nothing exists that is recognised as a state of international law."[1] The *ius ad rem* in this case arises out of the combination of the circumstances that the country was a *res nullius*, that the annexing power intended to acquire sovereignty over it, and that he has done some act of possession and proclaimed it as a notification of his intended acquisition.[2] The *ius in rem* is actual exclusive possession indicated usually by the establishment of some authority in the territory, or constructive possession, the best evidence of which is an ability to exclude other powers from taking possession.[3] The title dates from the time of the proclamation or other clear evidence of intention to appropriate.

Lord Mansfield in *Campbell* v. *Hall* enunciated as a proposition "too clear to be denied," that "a country conquered by the British arms becomes a dominion of the King in right of his Crown."[4] The *ius ad rem* is the right of succession to the rights and liabilities of the previous sovereign, resulting from the facts of conquest and intention to appropriate. The conquest, however, must be effective, and the mere circumstance that a place is in the possession and under the control of a hostile force is not sufficient to change its national character.[5] The conquest would seem to be complete when none of the ordinary governmental functions are being carried on by the old sovereign. The *ius in rem* takes the form of actual possession and ability to maintain that possession.

A treaty of peace by which the principle of *uti possidetis* is allowed to operate affords the best evidence of conquest, but it must be remembered that where the conquest has actually been effected, the conclusion of a treaty recognising this fact cannot operate to shift the date from which the conqueror's title runs; from the time of conquest to that of treaty.[6]

Treaties between the old and the new sovereigns may be merely evidence of the existence of the latter's title by conquest, or they may be actual conveyances of territory; it is with the latter class only that we are here concerned—those which are generally known as cession treaties. The treaty itself, if duly made, together with some notification thereof by public acts, in order that the persons most deeply interested in the event (as the inhabitants of the ceded country) may be informed under whose dominion

[1] Westlake, *Public International Law*, Part I. (Peace), p. 91.

[2] Cf. *The Fama*, 5 Rob. 115 (per Lord Stowell).

[3] Cf. Hall, *International Law* (6th edition), p. 560.

[4] 20 St. Tr. 322; cf. *The Foltina*, 1 Dods. 450 (per Lord Stowell).

[5] *Cremidi* v. *Powell*, 11 Moo. P.C. 88 (referring to the *St. Domingo* and *The Dart and Happy Couple*); *De Jager* v. *A.G. for Natal*, [1907] L.R. A.C. (P.C.) 326. Cf. *Craw* v. *Ramsey*, Vaughan 274; and *De Geer* v. *Stone*, (1882) 22 Ch. 243.

[6] Cf. Hall, *International Law* (6th edition), pp. 560–1.

and under what laws they are to live, constitute the *ius ad rem*.[1] The *ius in rem* is the same as that required in the cases of occupation or conquest.

When once it is established that any particular territory is part of the King's Dominions, it is perfectly clear that its water front extends to low-water mark; it is, however, not altogether clear how much of the marginal sea, if any, is included.[2] It is submitted that the present state of the law on the point is as follows.

The King's Chambers.—In the first place if the water front in question borders on some inland sea or boundary river, it is quite clear that, normally, the territorial limit of each adjacent state extends to the half-way line from shore to shore.[3] But if the water front extends along the open sea, so that it is in fact a sea front, the question is a different one. As far as harbours and other bodies of water which are clearly *inter fauces terræ*, it seems to be beyond doubt that the soil in them is part and parcel of the King's domain.[4] English law also holds certain larger bodies of water around the coasts of the United Kingdom, which are generally known as the "King's Chambers," to be part and parcel of the United Kingdom because they are *inter fauces terræ* and within the body of some county[5]; and speaking of these adjacent waters Lord Chief Justice Cockburn declared that "the law of England knows of but one territory—that which is within the body of a county."[6] Blackburn J. in *The Direct United States Cable Company* v. *The Anglo-American Telegraph Company*,[7] seems to have considered *R.* v. *Cunningham* applicable to the case of Conception Bay in Newfoundland, but gives two additional reasons for considering that bay to be British territory—namely, that in point of fact the British Government had for a long time exercised dominion over it, and further that it had by Acts of the British Parliament been declared to be part of the country made subject to the legislature of Newfoundland. The King's Chamber are, and large bays adjacent to the coasts of British Dominions other than the United Kingdom may be, therefore part of the dominions of the British Crown.[8]

It was contended on behalf of the Crown in *R.* v. *Keyn*[9] that within the realm was included a belt of sea extending around the coast of a width of three miles from low-water mark. But this contention was not upheld; for the Court, by a narrow majority, came to the conclusion that such waters

[1] *The Fama*, 5 Rob. at p. 115.
[2] See Report of Inter-Departmental Committee on Naturalisation Laws (1901), s. 12.
[3] Cf. *A.G. for Canada* v. *Cain and Gilhula*, 22 T.L.R. 757.
[4] *Denaby and Cadeby Collieries, Limited*, v. *Anson*, [1911] 1 K.B. at p. 177.
[5] *R.* v. *Cunningham*, 28 L.J. M.C. 66.
[6] *R.* v. *Keyn* (1876) L.R. 2 Ex. D. at p. 198.
[7] L.R. 2 A.C. 394.
[8] Piggott, *Nationality*, vol. i. p. 13; cf. Pitt-Cobbett, *Cases and Opinions on International Law*, Part I. (Peace), 3rd edition, p. 138.
[9] (1876) L.R. 2 Ex. D. 63.

were out of the realm. This decision does not seem to have been regarded as of binding authority outside the United Kingdom, and the practice in the British Colonies ever since seems to have been to regard the jurisdiction of the Colonial Courts as extending of right to all persons within the territorial waters of the colony—that is to say, within the three-mile belt.[1] It does not appear that the Territorial Waters Jurisdiction Act, 1878, has altered the position as far as the United Kingdom is concerned; but if it has done so, then the whole of the British Empire is on a par in respect of the three-mile zone.

The point is of importance only in so far as it affects the freedom of foreign ships within that zone, for there is no doubt that British ships within British territorial waters are within the King's protection. There is no doubt that foreign public ships are entirely exempt from any local jurisdiction that may exist over this three-mile belt or elsewhere[2]; and it is submitted that, since foreign merchant ships have a right of innocent passage through those waters, they are equally exempt.[3] Persons, therefore, who are born within the three-mile zone upon a foreign public vessel certainly, and those born upon a foreign merchant vessel probably, are not born within the protection of the King, and consequently are not natural-born British subjects by the Common Law. The latter half of this conclusion is supported by the opinion of Lindley J. in *R.* v. *Keyn*, one of the minority of the Court, who upheld the contention of counsel for the Crown, and remarked: "It is said that the consequence of upholding this conviction will be inconvenient and absurd. It is said to be absurd that a child born in a foreign ship passing through English waters[4] should be treated as a native-born English subject. I am, however, by no means prepared to admit this to be a consequence of the limited principles which I have sought. . . ."[5]

Of those territorial waters which we have shown to be within the British Dominions, the ports, harbours, and rivers are certainly subject to no right of innocent passage or entry vested in foreign merchant ships; such a ship on its entry becomes "as much a *subditus temporaneus* as the individual who visits the interior of the country for the purposes of pleasure or business";[6] and therefore, every person born thereon at such a time is born within the King's Dominions, and is a natural-born British subject by the Common Law.[7]

[1] Cf. Keith, *Responsible Government in the Dominions* (1909), p. 215, and see *The D. C. Witney* v. *St. Clair Navigation Company*, 38 Can. S.C.R. 303; *Robtelmes* v. *Brenan*, 4 C.L.R. at p. 404 (per Griffiths C.J.); *Merchant Service Guild of Australasia* v. *Archibald Currie & Co. Ltd.* 5 C.L.R. at p. 744 (per O'Connor J.). Cf. Forsyth, *Cases and Opinions on Constitutional Law*, pp. 24, 25.

[2] Cf. *The Parlement Belge*, (1880) 5 P.D. 197.

[3] Cf. the views put forward by Ernest Nys, *Le droit International*, tome i. pp. 516 *et seq.*

[4] *I.e.* English waters not being within the body of a county.

[5] (1876) L.R. 2 Ex. D. at p. 97.

[6] Per Sir Robert Phillimore in *R.* v. *Keyn*, ubi sup. at p. 82; see also the judgment of Lindley J.

[7] Cf. article by Mr. G. Addison Smith in *Juridical Review* (Oct. 1906).

In spite of a declaration in Hansard on Aliens[1] that "in early times it was a matter of some doubt as to the situation in which persons born upon the English seas[2] stood with respect to this country; but it was held that such persons were not aliens," the point is not free from doubt, as foreign merchant ships have no right of innocent passage. Since, however, the King's Chambers are clearly part of the King's Dominions, just as are harbours and rivers, it would seem to be the more consistent plan to deny the existence of any right of innocent passage. It is therefore submitted that all persons born on foreign merchant ships within these territorial waters also are natural-born British subjects.[3]

There now remain for an explanation the circumstances under which a British ship[4] is to be deemed a floating portion of the King's Dominions. It is certain that a British merchant vessel on the high seas or, of course, within British territorial waters, comes within the operation of the fiction of exterritoriality, for this is expressly declared in *Marshall* v. *Murgatroyd*.[5]

The reason for this is that the ship is subject to no jurisdiction other than that of the King,[6] and, therefore, since a British public ship is likewise free from foreign control wherever she is,[7] all persons born on her are born within the protection of the King, and are consequently natural-born British subjects. It is, however, doubtful whether children born on board British merchant vessels within the territorial waters of a foreign state are natural-born British subjects at Common Law. It is submitted, for the same reasons as have been urged in the case of foreign ships in British territorial waters, that where there exists a right of innocent passage for foreign ships, the latter are for practical purposes on high seas, and if they are British, any child then born on board is born within the King's protection. When, however, such ships enter into a foreign port or harbour, though the Admiralty jurisdiction is not thereby extinguished,[8] still, during their sojourn there, they are subject in the last resort to local jurisdiction, and consequently are not under the protection of the King.[9]

[1] 1844, at p. 93.

[2] Which are now represented by the King's Chambers.

[3] Cf. article, already cited, of Mr. G. Addison Smith, where the writer asserts the same conclusion.

[4] As to what is a British ship see Merchant Shipping Act, 1894, s. 1, and *Union Bank of London* v. *Lenanton*, 3 C.P.D. 243.

[5] (1870) L.R. 6 Q.B. 31.

[6] *R.* v. *Carr & Wilson*, (1882) 10 Q.B.D. at p. 85.

[7] *The Exchange* v. *McFaddon*, (1812) 7 Cranch 116 (U.S.A.); *The Parlement Belge*, (1880) 5 P.D. 197; *Young* v. *SS. Scotia* (a Canadian Government railway ship), [1903] A.C. 501.

[8] *R.* v. *Carr & Wilson* (supra).

[9] Cf. *R.* v. *Keyn*, (1876) L.R. 2 Ex. D. at p. 82: "A oreign merchant vessel going into the port of a foreign state subjects herself to the ordinary law of the place during the period of her commorancy there" (per Sir Robert Phillimore).

Conclusion.—It seems, then, that the Common Law confers British nationality on the following persons, and no others, at the moment of their birth:

1. The children of the King born in a foreign country or on a foreign ship;

2. The children of a British ambassador, if they be born in the country to the Court of which their father is accredited, provided that the father be not a subject of that country;

3. All persons born within the British Dominions (including territorial waters not subject to a right of innocent passage), except such as are born to an alien enemy in occupation of some part of those dominions, and except children born there or on board British ships to foreign sovereigns or to foreign ambassadors accredited to the King of England, not being British subjects, and children born on a foreign public vessel;

4. All persons born upon a British public vessel wherever situated;

5. All persons born upon a British private vessel, unless she be in the territorial waters of a foreign state, which are not subject to a right of innocent passage.

NATURALISATION.

(2) NATURALISATION IN THE BRITISH DOMINIONS, WITH SPECIAL REFERENCE TO THE BRITISH NATIONALITY AND STATUS OF ALIENS BILL, 1914

[*Contributed by* E. B. SARGANT, ESQ.]

1. British Nationality and Status of Aliens Bill, ordered to be printed March 9, 1914.
2. Debate in the House of Lords on the motion for second reading of the Bill, March 17, 1914.
3. Debate in the House of Commons on the motion for second reading of the Bill, May 13, 1914.
4. A Paper on the Bill read by J. Saxon Mills at a special meeting of the Royal Colonial Institute on March 16, 1914, and reprinted in the May number of the Journal of the Institute (*United Empire*).
5. An Article by Richard Jebb in the *Quarterly Review* for January 1914.

THE Bill with the short title given above is further described as intended "to consolidate and amend the enactments relating to British nationality and the status of aliens." In the schedule containing the laws which would be repealed in whole or in part by its enactment are statutes of Edward III., William III., Anne, George II., George III., and Victoria, a sufficient indication in itself (and without consideration of the more numerous laws repealed by the Naturalisation Act of 1870) of the extent to which this question throughout our history has assumed new forms with the growth or the fluctuations of our population at home and overseas. The Bill also amends the Common Law of this country in regard to nationality—for which see the preceding article. Of the three parts of the proposed enactment, the first defines a natural-born British subject; the second specifies the conditions under which a certificate of naturalisation may be granted or revoked; while the third contains various provisions of a general character—one of them greatly diminishing the scope of the Bill by still permitting the acquisition of that merely local status as a subject of the Crown which had been so severely criticised at successive Imperial Conferences, and which in point of fact had spurred on our own Government to this fresh legislation.

Natural-born British Subjects.—In considering the broad effect of the proposed law, we cannot do better than follow it part by part, except

in regard to a few sections where clearness demands another course. Some general observations, chiefly upon the usual but inexact conceptions of the privileges conferred by British nationality, will be placed at the end. Our first business is therefore with the persons deemed to be natural-born British subjects in addition to those who are "born within His Majesty's dominions and allegiance." In Part I. the Bill has special regard to children born in places where by treaty, capitulation, grant, usage, sufferance or other lawful means, the Crown exercises jurisdiction over British subjects. In these protectorates and spheres of influence, as they are generally termed, the child of a British subject is to be deemed to have been born within the King's allegiance, the section in this respect having retrospective action. There is also an innovation in regard to children of British parentage born in foreign parts. Whereas at present it is sufficient for British nationality that the father or grandfather was born in the King's dominions,[1] s. 1 provides that "any person born out of His Majesty's dominions, whose father was a British subject at the time of that person's birth and either was born within His Majesty's allegiance or was a person to whom a certificate of naturalisation had been granted," shall be deemed to be a natural-born British subject. This change will no doubt operate to diminish the number of persons to whose nationality there is a double claim, owing, as Professor Westlake observed, to there being "no universal agreement as to the conditions or tests which determine to what State sovereignty each individual shall be subject."[2]

The number of doubtful claims will be further diminished by the inclusion in the Bill among natural-born British subjects of any person born on board a British ship whether in foreign territorial waters or not, and by the corollary —s. 1 (2)—that a person born on board a foreign ship shall not be deemed to be a British subject by reason only that the ship was in British territorial waters at the time of his birth. These provisions, as well as that with regard to Protectorates, embody recommendations made by an Inter-Departmental Committee which reported in 1901. They settle moot points at Common Law, as will be seen on reference to the preceding article.

Local Naturalisation.—Of course the number of persons who acquire their British nationality through any circumstances other than that of being born within the King's dominions and allegiance is relatively small, and it is very necessary that we should keep this fact in mind now that, in Part II. of the Bill, we approach the question of naturalisation. In Asia and Africa, according to an official estimate made in 1908, there are some 260,000,000 persons of British nationality, so that even at the low rate of increase in India there would be from this source alone a yearly addition of between one and two millions of natural-born British subjects of non-European descent As regards the numbers acquiring British nationality by certificate

[1] 13 Geo. III. c. 21, s. 1.

[2] *British Citizenship*, p. 9. (Longmans, 1912.)

no figures are readily available. But one main source of naturalised aliens (certainly exceeding all other oversea sources) has peculiar interest. Sir Wilfrid Laurier said at the Imperial Conference of 1911 that Canada received annually at that time some 100,000 American citizens who generally took out letters of naturalisation as soon as it was possible to do so. And he added, "Those 100,000 American citizens are British subjects in Canada, but if they come to Great Britain they are still American citizens. . . . I think this principle may be laid down to be ultimately reached—a British subject anywhere, a British subject everywhere." If the present Bill had completely fulfilled the wishes of the then Canadian Premier, the applications from this source alone for certificates of naturalisation valid everywhere might each year after its enactment have amounted to quite a noticeable percentage of the annual increase in British subjects. But as the result of the provision, to which reference has already been made, as preserving to the legislature of a British possession the power to impart to any person any of the privileges of naturalisation to be enjoyed by him within the limits of that possession—s. 26 (2)—the number of certificates having local as opposed to general effect is likely to remain large. Indeed Mr. Jebb says in the *Quarterly Review* that "in the debates at Ottawa the opinion was expressed that 90 or more per cent. of aliens in Canada would be content when after three years' residence in the Dominion they were able to obtain the local certificate and acquire the privileges of Canadian citizenship." This, then, gives us some slight material for judging as to the number of persons who are likely to avail themselves of the facilities provided by the Bill.

A preliminary word is also necessary as to the value of the privileges conferred. Under the section (26) just quoted, it is provided that nothing in the proposed enactment is to "take away or abridge any powers vested in or exerciseable by the Legislature or Government of any British possession, or affect the operation of any law at present in force which has been passed in exercise of such a power, or prevent any such Legislature or Government from treating differently different classes of British subjects." This subsection makes it clearer than the Act of 1870 that, in becoming a British subject, no person can acquire any rights of citizenship except such as may be conferred by the local laws, thus giving statutory emphasis to Lord Halsbury's statement in the case of *Cunningham* v. *Tomey Homma*, [1903] A.C. 151, "The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalisation, but the privileges attached to it, where these depend upon residence, are quite independent of nationality."

Extended Naturalisation.—The opening section (2) of Part II. defines the conditions under which a certificate of naturalisation may, in his absolute discretion, be granted by the Secretary of State to an alien in the United Kingdom, and later on (s. 8) the power to grant a certificate having the same effect is extended to the Government of any British possession. It is therefore highly desirable that in future no "letters"

conferring a merely local status as a British subject should be referred to as a certificate of naturalisation. In all cases in which the latter is granted, five years' residence in the King's dominions is required, the last year being spent in the country of application, but the service of the Crown is made equivalent to such residence. The applicant must be of good character, have an adequate knowledge of the English language, or of any language recognised in any British possession as on an equality with our language, and declare his intention either to reside in the King's dominions, or to enter or to continue in the service of the Crown. The foregoing requirements will now be conditions of naturalisation in all parts of the Empire.

This is a real step forward, for ever since the reign of Charles II. (as Mr. Mills notes) the legislatures of British possessions have been passing Acts for the naturalisation of aliens, though it was not until 1847 that the Imperial Parliament enacted a law purporting to give validity to this Colonial legislation. The consequence has been that the conditions prescribed in different parts of the Empire vary in a remarkable degree, no period of residence at all being required in New Zealand, while two years' residence is necessary in Australia and South Africa, and three in Canada. It may be, as has been sometimes suggested, that shorter periods of residence than in the United Kingdom are prescribed in sparsely populated countries, with a view to turning suitable aliens as soon as possible into electors. But another and a simpler cause may also be at work. Legislation and governmental action at home (on matters of common interest to the Dominions) are adopted locally, sometimes quickly and sometimes slowly, but generally soonest in those British possessions which are least distant from us, and with which we have the most intercourse. Now if we turn for a moment to our home legislation on this subject, we find that the Act of 1844 (which was repealed by the Act of 1870) empowered the Secretary of State to issue a certificate of naturalisation at his own discretion. It was not until 1856 that he was advised that it would be lawful to require an alien to declare his intention of settling in the United Kingdom, and the condition of five years' previous residence in our country did not obtain until the Act of 1870. Thus, without any set intention, local laws and regulations throughout the Empire may come to differ widely, even in regard to a matter about which it is specially desirable that there should be uniformity of legislation.

The means by which such uniformity is to be obtained in the present instance are set forth in ss. 8 and 9, and these will be found of more interest than the intervening clauses. Let us therefore rapidly pass over s. 3, entitling the alien naturalised in the United Kingdom to all political and other rights to which a natural-born British subject is entitled; s. 4, which is concerned with the issue of a special certificate in cases where the British nationality of any person is in doubt; s. 5, which allows the name of any child of an alien to be included in the certificate; s. 6, permitting an alien pre-

viously naturalised to receive a fresh certificate; and s. 7, enabling the Secretary of State to revoke any certificate obtained by fraud. The provision extending to the Government of any British possession the power to grant a certificate of naturalisation having the same effect as a certificate granted by the Secretary of State forms the subject-matter of s. 8, and at this point we come face to face with differences of constitutional procedure in the case of Crown Colonies and of the self-governing Dominions and British India. It is provided that "in any British possession other than British India and a Dominion specified in the First Schedule to this Act (*i.e.* Canada, Australia, New Zealand, South Africa, and Newfoundland) the powers of the Government of the Possession under this section shall be exercised by the Governor or a person acting under his authority, but shall be subject in each case to the approval of the Secretary of State, and any certificate proposed to be granted shall be submitted to him for his approval." In practice this means that the Crown Colonies had little voice in the preliminary negotiations before the Bill assumed its present form, nor is it likely that any local legislation will there be required.

Preliminary Negotiations.—The case of the self-governing Dominions is quite different. S. 9 opens with a proviso that the second part of this Bill shall not have effect within any of the Dominions specified in the first schedule unless it is adopted by the legislature of that Dominion. Constitutionally British India stands by itself, but without enlarging on this, we may be sure that the chief obstacles to preparing a satisfactory draft did not come from that quarter. The main object of the home authorities was to secure a form of the Bill, for the essential part of which (Part II.) the Governments of the self-governing Dominions would assume responsibility. This involved repeated submissions of the draft to Ministers overseas, and even led to anticipatory discussions in the Canadian legislature.

The labour involved and the time occupied in these preliminary negotiations are well summarised by Mr. Jebb, and we cannot do better than give an extract from his article:

"The remedial proposal of the Committee in 1901 was circulated to the Dominions by Mr. Chamberlain, and came before the Colonial Conference over which he presided in 1902. Correspondence was continued under the Liberal Government, which succeeded to office at the end of 1905. The matter was carried another stage at the Colonial Conference of 1907, by which time the first draft of the proposed Imperial Bill had been prepared, embodying largely the views of the Committee. . . . A resolution was passed contemplating the holding of a Subsidiary Conference if the matter could not be settled otherwise. In the following year (1908) another Inter-Departmental Committee was arranged in Downing Street. . . . No Subsidiary Conference was held, the negotiations being conducted by correspondence up to the next session (1911) of the Imperial Conference."

By this time it had become clear that there were two courses open to

the parties concerned. The one was to continue on the lines of the Bill. The other lay in giving extra-territorial effect, by an Imperial Act if necessary, to the actual naturalisation laws of the self-governing Dominions. The latter course was favoured by Sir Wilfrid Laurier as a simple means of attaining his object, "A British subject anywhere, a British subject everywhere." At this point the Imperial Government raised an objection. It was confronted with the spectres of our own past legislation; with those easier conditions of naturalisation which had formerly been prescribed, and which now seemed more than ever insufficient in view of the pecuniary advantages of old age pensions and insurance benefits and other amenities from which aliens are excluded. Mr. Churchill, as Home Secretary, refused to accept less than five years' residence within the Empire in connection with any certificate of naturalisation valid in the United Kingdom, and so the redrafting of the Bill was once more resumed. By the end of 1912 the assent of Canada alone was wanting.

The nature of the objections of Mr. Borden's Government (which in the meantime had replaced that of Sir Wilfrid Laurier) may best be considered in connection with that part of s. 9 at which we have now arrived, since presumably the present wording of the second sub-section must have removed the difficulties which were expressed by the Minister of Justice in the third debate (January 29, 1913) in the Canadian House of Commons. The sub-section runs as follows:

"Where the Legislature of any such Dominion has adopted this part of this Act, the Government of the Dominion shall have the like powers to make regulations with respect to certificates of naturalisation and to oaths of allegiance as are conferred by this Act on the Secretary of State."

By s. 91 of the British North America Act of 1867 the British Parliament delegated to the Canadian Parliament the power to legislate in regard to naturalisation. Did this, then, give to Canada all the power required for conferring the complete and not merely the local status of British subject? Mr. J. S. Ewart, K.C., in the *Canadian Law Times* of November 1911 maintained that it was so, but the Minister of Justice did not go as far as this. He considered, however, that by the contemplated Act the British Parliament would be enlarging the scope of the status conferred in Britain by naturalisation; and some Imperial legislation was therefore required for similarly enlarging the scope of the status which Canada could confer by virtue of the power delegated in 1867. As Mr. Jebb points out, the Canadian Minister of Justice was able to state that the British Government, after first disputing his interpretation of the clause in question, had agreed that he was probably right, and had readily promised to make the required correction of the draft. But Mr. Mills holds that expert opinion leads to the view that "the Act of 1870 is operative throughout the whole British Empire and everywhere else." In moving the second reading of the Bill under consideration in the House of Lords, Lord Emmott said, "At present an alien

naturalised in the United Kingdom carried with him, either by right or by courtesy, over the whole world practically the same privileges as a natural-born British subject." In the House of Commons Mr. Harcourt stated more definitely that "British naturalisation has been valid throughout the Dominions, indeed throughout the world." But whatever the present position, it is clear that the new certificates of naturalisation will not have effect in any of the self-governing Dominions until their legislatures have adopted Part II. of the Bill. With regard to this part it only remains to add that a subsequent sub-section of s. 9 permits the legislature of any Dominion in the first schedule to rescind its operation.

In Part III. we are in smoother waters, since our concern is no longer with a part of the Bill which must be adopted by all the legislatures concerned. There is a group of sections (10-12) dealing with the national status of married women and infant children—which, however, met with a good deal of criticism in the second reading debate in the House of Commons—and another group (13-16) concerned with the loss of British nationality and declarations of alienage. The status of aliens is dealt with in ss. 17 and 18, procedure and evidence form the subject-matter of ss. 19 to 24, and the Bill closes with a group of sections (25-28) called supplemental, opening with a declaration that "nothing in this Act shall affect the grant of letters of denization by His Majesty." This section reminds us that until 1844, and apart from a special Act of Parliament, letters of denization were the only means of acquiring the status of a British subject. As regards the last section (before we come to "definitions"), namely s. 26, it is of such importance, as preserving the rights of local legislatures and governments to treat differently different classes of British subjects, and further, as retaining local powers to impart any of the privileges of naturalisation within local limits, that we have placed it in the forefront of the discussion as affecting our whole conception of the Bill. The section need not therefore be further considered.

Effect of the Legislation.—This review of the Bill and of the circumstances which led to its production may shatter the previous convictions of some of us. A so-called British subject is found in certain conditions not to be a British subject at all, and the proposed legislation will not make him such. Some years ago the question was put in the Journal of the Royal Colonial Institute, "What is a British Citizen?" and a concise and entirely justifiable answer was given by Dr. Walton, the Dean of the Faculty of Law at Montreal. Using the immortal phrase of Betsy Prig, he said: "I don't believe there ain't no sich a person." In the case of the British subject such a disillusionment does not await us. If "natural-born," he can have no uneasiness about his description or rights, except in the rare instance of another State also claiming him as one of its members. When this is so, and his "nationality is claimed by a State to which he does not wish to belong, he should avoid," as Dr. Westlake drily observed, "entering its

territory." A British subject who receives his qualification by naturalisation can never be in a better position than a natural-born British subject, and therefore is equally liable to claims of this sort. In future, if the certificate be obtained under the proposed Act, he will never, from the date of his naturalisation, be in a worse position than if he were natural-born. But, as we have seen, there is likely still to remain a considerable number of persons with only a local status as subjects of the Crown. Most of them will be able to obtain electoral rights locally, while there may also be found in the same British possession a number of persons who are British subjects without any limitation, but who belong to a class ineligible for the franchise. A passport issued by the Foreign Office to any member of this unenfranchised class would be in the usual form, while a Canadian citizen who was only a Canadian subject of the Crown would find his corresponding document endorsed as follows: "This passport is granted with the qualification that the holder is, within the limits of the Colony in which he was naturalised, a British Colonial subject by naturalisation and is only entitled as a matter of courtesy to the general good offices and assistance of His Majesty's representatives abroad." It is true that such cases will not often occur, for on the one hand the British subjects of non-European descent who form the bulk of the unenfranchised class are rarely likely to be able to travel in foreign lands, while British Colonial subjects who intend to do so will usually be qualified and desirous to procure the new certificate of naturalisation. Nevertheless such a confusion of privileges in regard to subjecthood and citizenship ought not to exist, and is indicative of deep-seated constitutional defects in the methods of legislation throughout the British Empire.

Subject and Alien.—In one noteworthy respect the British subject and the British Colonial subject have the same rights as opposed to the alien. They can both hold a proprietary share in a British ship. It was the Naturalisation Act of 1870 which removed the restrictions upon the acquisition and holding of real and personal property by aliens in the United Kingdom, but property in British ships was made the one exception. The Merchant Shipping Act expressly provides that local naturalisation in a Colony shall qualify for this privilege. That British ships should have this sacrosanct character, as distinguished from ordinary British territory, greatly stirs the political imagination. It makes the high seas in our thoughts the very home of our people, and suggests that in logic any truly Imperial Parliament should be assembled on board ship, the legislative squadron moving from one British dominion to another, much as the early English Parliaments were convened first in one royal city and then in another.

Subject and Citizen.—It would be out of place to go further into the privileges possessed by a British subject in contradistinction to an alien. But one effect of the many discussions which have preceded the introduction of this Bill has been to make it clear to the various self-governing Dominions

that these privileges, however obtained, have no necessary connection with political privileges, or with the right to unrestricted movement within the British Dominions. There may be, and often are, local laws distinguishing between different classes of British subjects (no less than of aliens) who wish to enter a possession of the Crown. There are everywhere laws as to political rights which prevent minors from acquiring such privileges; and in the case of the United Kingdom, as in many other British lands, there is sex-differentiation in regard to the Parliamentary franchise. But as between the Imperial and local Governments the chief struggle has generally been over that declaration of uniformity of racial treatment which was contained (for instance) in the proclamation of the Crown in 1842, declaring Natal to be a British Colony: "There shall not be in the eye of the law any distinction or disqualification whatever founded on mere distinction of colour, origin, language, or creed." Since the passing of the Act establishing the Union of South Africa, and perhaps even more since the terms of this naturalisation Bill have been subjected to the scrutiny of the Imperial Conference, the Governments of the self-governing Dominions have become fully assured that the assent of the Crown will not be withheld from measures passed by their legislatures, even when these conflict with the principles enunciated above. Subjecthood is seen to have no necessary relation to citizenship. Thenceforward the proposals for a common naturalisation law have found readier acceptance, though the details, as we have seen, have required very careful handling.

Constitutional Aspects.—Always below the surface of these negotiations, but sometimes rising formidably above, is found the question of the constitutional relations between the Imperial Parliament and the local legislatures. Is the former merely *primus inter pares*, or has it a dominant position? This is not a question of recent origin. In Jamaica, for example, it emerged in 1823 in connection with the resolutions of Parliament for the emancipation of slaves. In their address to the King the members of the Assembly said that they had never taken an oath of allegiance to the English Parliament, and would not submit to the degradation of having their internal affairs regulated by a body whose power in Great Britain was not greater than their own in Jamaica.[1]

To enter upon a discussion of this question would carry us altogether beyond the limits of the present article; but one opinion may safely be ventured, namely, that the methods by which the present Bill has been brought to a point at which its enactment by all the legislatures concerned is reasonably certain have proved so tedious that every one concerned will long for some more rapid constitutional means of effecting the same object. Mr. Jebb asks whether we may not expect uniform subjecthood under the common Crown to lead to a common citizenship of the Empire. To the mind of the writer it is not so much what this particular legislation will have done to

[1] Gardner's *History of Jamaica* (London, 1909, p. 258).

bring nearer a uniform status of British subject, but the difficulty experienced in coming to any agreement for common legislation on so important a matter, which will more than ever turn the thoughts of British statesmen throughout our Empire to the need for an Imperial Parliament constituted on such a representative basis as will enable it to hold in reality, and not in doubtful fashion or merely legally, a dominant position among British legislatures.

THE JAPANESE LAW OF MARRIAGE.

[*Contributed by* J. E. DE BECKER, ESQ.]

JAPAN is, and always has been, a monogamous country, and at no time in her history have polygamous unions been publicly tolerated. It is quite true that concubinage has existed, as it was considered the duty of every head of a house to beget male issue for the purpose of leaving a son to perpetuate the worship of his ancestors and himself; but the State has never recognised more than one *legal* wife, and, while divorce was formerly very easy, bigamy was never permitted. Even when the husband could divorce his wife at his discretion, it was only on seven specific grounds enumerated in the law, and moreover a formal writing had to be drawn up and delivered to her, and this had to be countersigned and approved by the nearest ascendants.

Historical Survey.—Minute provisions in respect to the law of marriage were embodied in the *Taihō-Ryōritsu* (a comprehensive body of law compiled on a Chinese model and completed in the 1st year of the *Taihō* era (A.D. 701-3), from which year-name it derives its title). According to the Family Law included therein:

> Marriage is permitted when a man is at least fifteen years old and a woman thirteen. When giving a girl in marriage, consent must be first obtained from her relatives.

But as time went on and customs changed, people grew daily more lax and extravagant, and the rules relating to marriage soon fell into utter desuetude. From the *Kwampei* (889-97) and *Engi* (901-22) eras downwards the moral atmosphere of the Imperial Court became corrupt. Under Minamoto Yoritomo's military Government at Kamakura (1147-99), and that of the military rulers who succeeded him, there were no special regulations concerning marriage until under the Tokugawa Shogunate (1603-1868) it was provided in the eighth article of the Miscellaneous Regulations for the Control of Military Houses (*Buke shohatto*), which was promulgated in the 20th year of *Keichō* (1615) by Tokugawa Ieyasu, that "no marriage shall be secretly entered into inasmuch as marriage is the means by which the male (positive) and female (negative) principles unite themselves, and so it must not be lightly or carelessly contracted"; and this injunction was fortified by quotations from the Book of Changes and the Book of Poetry (two of the Confucian

classics) to the effect that marriage should be contracted with friends and not with foes, because opportunity would be lost if one had a mind to marry with foes, and that should men and women be properly united and marriage contracted, in time there would be no unmarried persons in the country; but it was the origin of evil schemes and conspiracies to form parties by marital connections. The eighth article of the Miscellaneous Regulations of the 12th year of *Kwan-ei* (1635) provides that "lords of provinces, lords of castles, persons possessed of fiefs of at least 10,000 *koku* and chiefs of the (*Shōgun's*) retainers are hereby forbidden to contract private marriages." According to the eighth article of the regulations of the 3rd year of *Kwambun* (1663) it is additionally provided that "persons who desire to enter into marital connections with Court nobles shall make due notification and obtain permission from the authorities." The eighth article of the Regulations of the 3rd year of *Tenna* (1683) reads:

> Lords of provinces, lords of castles, persons having fiefs of at least 10,000 *koku*, high commissioners and chief officials shall not privately contract marriage, and in case they desire to enter into marital connections with Court nobles, application shall be made to the authorities for instructions.

Art. 14 of the Regulations of the 7th year of *Hōei* (1710) runs to the effect that:

> Persons possessing fiefs of at least 10,000 *koku* and officials higher than those without Court rank, and retainers (of the *Shōgun*), are not permitted to contract marriage privately among themselves. In case they desire to negotiate marriage with Court nobles, engagement shall be entered into after the permission of the authorities has been obtained.

The regulations of the 2nd year of *Kyōhō* (1717) under the rule of Tokugawa Yoshimune, of the 3rd year of *Enkyō* (1746) under the rule of Tokugawa Ieshige, of the 11th year of *Hōreki* (1751) under the rule of Tokugawa Ieharu, of the 7th year of *Temmei* (1787) under the rule of Tokugawa Ienari, of the 9th year of *Tempō* (1838) under the rule of Tokugawa Ieyoshi, of the 7th year of *Kaei* (1854) under the rule of Tokugawa Iesada, and of the 6th year of *Ansei* (1859) under the rule of Tokugawa Iemochi, all contain, under the head of marriage, the same provisions as the aforementioned regulations of the *Tenna* era. There were also regulations called the "*Shoshi Hatto*," which were regulations for the control of warriors under the *Shōgun's* own banner having fiefs of less than 10,000 *koku*.

Subsequent to the Restoration of 1868 various rules regarding marriage were promulgated. Thus: On November 3, 1870, regulations were issued as to reports to be submitted to the authorities with regard to marriage, according to which nobles were required to report to the *Dajōkwan* (Grand Administration Council) and *samurai* (gentlemen entitled to wear swords) to the prefectural governments, a report being transmitted from prefectural governments to the central government in the case of *samurai* intermarrying

with peers; and in cases of different classes of people from *samurai* downwards licences were to be obtained from local governments. On August 23, 1871, permission was extended to the intermarriage of peers and commoners, in which case the fact was to be notified to the mayor of the place and registration was to be made according to the Law concerning Transfers of Personal Registrations (*Sōsekihō*), but no other notification to the authorities was required, the regulations dated November 1870 being thereupon cancelled. On March 14, 1873, it was permitted to enter into marital relations with foreigners. By *Dajōkwan* Notice No. 209 it was provided on December 9, 1875, that a marriage or divorce or the conclusion or dissolution of an adoption should be regarded as non-effective until the fact was registered in the Family Registrar's Book on both sides, even though the matter might have been actually carried out by the mutual agreement of the parties concerned. By Law No. 100, October 1890, were issued rules of procedure in actions relating to marriage and adoption which have been revised into the present Law of Procedure in Actions relating to Personal Status.

"Marriage" as embodied in the Japanese Civil Code consists of a solemn contract, made in due form of law, by which a man and a woman, being under no legal disability, reciprocally engage to live with each other during their joint lives, and to discharge towards each other the duties imposed by law on the relation of husband and wife. A mere union of a man and woman, not publicly and legally recognised by means of registration in accordance with the provisions of the Civil Code, is not deemed to be a "marriage," and persons who cohabit as husband and wife without observing this procedure are known as *naien no fūfu* (husband and wife informally allied), which in modern times is a polite euphemism for a condition of respectable concubinage. Such a union has no legal effect whatsoever, and any children born by the woman are illegitimate.

The substantial conditions of marriage may be summed up under seven headings, while the formal conditions may be considered more briefly.

Substantial Conditions.—1. *Consent of the Parties.*—The relation of marriage must be formed in accordance with the free and voluntary intention of the parties to the act. Such intention must always be expressed *in person*, and no proxy is permitted. This is an absolute and fundamental rule, therefore even the legal representative of either party is not authorised to express an intention of this nature on behalf of his principal. There are, therefore, cases where lunatics, idiots, etc., cannot be parties to marriages. A marriage is void if either party had no intention to get married owing to mistaken identity or other reason,[1] while marriage can be cancelled if there be any defect in the intention of either party—*id est*, if it has been brought about by fraud or coercion.[2]

2. *Age of the Parties.*—The man must be at least seventeen years of age and the woman at least fifteen years of age.[3]

[1] Civil Code, Art. 778, No. 1. [2] *Ibid.* Art. 785. [3] *Ibid.* Art. 765.

3. *The Marriage must not be Bigamous.*—Bigamy is one of the most serious of violations of the duties involved in marriage, inasmuch as it is practically equivalent in nature to adultery itself; so that civilly it forms a cause of judicial divorce,[1] while criminally it renders the parties concerned liable to a penalty for bigamy.[2] A bigamous marriage is not, however, void *ipso facto*, but can be cancelled; and the cancellation of a marriage being possessed of no retroactive effect,[3] it would appear that even such a marriage must be regarded as valid so long as it is not duly cancelled, and that legally the bigamist possesses two legitimate spouses during that time.[4]

4. *The Period during which one is Forbidden to Contract a Second Marriage must have Expired.*—A "second marriage" in this connection refers to cases where a woman, whose marriage with a man has been dissolved or cancelled, contracts another marriage with another man. (There is, of course, no legal restriction or obstacle in the way of a woman desiring to resume conjugal relations with her former husband, for the legal tendency in Japan is to encourage such course.) That a faithful woman should not mate with a second husband has long been a tenet of oriental (Chinese) ethics, but, while the validity of this doctrine may be contested even from a moral point of view, it would certainly be impolitic to enforce it legally. Japanese law, therefore, does not forbid remarriage, but it forbids a woman to remarry until six months have elapsed from the day when her former marriage has been dissolved or annulled.[5] For many practical purposes it is necessary that in regard to each person his, or her, parentage should be clearly ascertained, and this is especially the case in a country like Japan, where particular importance is attached to the family system; and it would be difficult to ascertain the paternity of the offspring if a woman who got remarried immediately after severing relations with her former husband gave birth to a child within a doubtful period of time. Hence this restriction. The period which has been fixed is a short one as compared with other legislative precedents and the provisions in force in the earlier years of the Meiji Epoch, the idea being that there is no reason for preventing a woman from getting remarried during a needlessly long period, and six months are deemed to form a time amply sufficient for ascertaining whether she is pregnant with a child by her former husband or not. But in case a woman is delivered of a child by her former husband after the termination of her marriage with him, she may at once get remarried, even though the said period of six months has not yet expired,[6] because there is then no reason for further delay.

5. *The Marriage contemplated must not be one between Parties to an Adultery.*—It is provided that a person who has been divorced on the ground of, or sentenced to a criminal penalty for, adultery, cannot be married

[1] Civil Code, Art. 813, 1.
[2] Criminal Code, Art. 184.
[3] Civil Code, Art. 787.
[4] *Ibid.* Art. 766.
[5] *Ibid.* Art. 767, 1.
[6] *Ibid.* Art. 767, 2.

to the other party to the adultery,[1] because if he or she could, such divorce or criminal penalty, which is chiefly intended to be a sanction for adultery, would only furnish the adulterous pair with facilities to legalise their improper relations, to the serious prejudice of public welfare and good morals. But "divorce" in this connection is strictly confined to judicial divorce; for even if a wife be divorced by mutual consent, the real ground of the arrangement being the fact that she has committed adultery, she is not prevented from being married to the other party to the adultery, because in the case of divorce by mutual consent the reasons for which the step has been adopted are not publicly disclosed. *En passant*, it may be noticed that recent legislative tendency is to abolish such restriction, for in France the provisions of Art. 298 of the Civil Code forbidding marriage between the parties to adultery has been repealed by law issued on December 15, 1904, and the new Swiss Civil Code does not forbid such marriage.

6. *The Marriage must not be one between Persons too Closely Related.*—The provisions of the Civil Code on this head, which seem to be chiefly based on moral considerations, are as follows:

No marriage can be effected between lineal relatives or between collateral relatives within the third degree of relationship. This does not, however, apply between an adopted child and one of his or her collateral relatives on the side of the adoptive house.[2]

No marriage can be effected between lineal relatives by affinity. The same applies when the relationship by affinity has ceased in accordance with the provisions of Art. 729 (*id est*, by divorce or by reason of the surviving spouse leaving the house on the death of his or her wife or husband).[3]

No marriage can be effected between an adopted child, his or her spouse, his or her lineal descendants or their spouses on the one hand, and the adoptive parents or their lineal descendants on the other, even after the relationship has ceased in accordance with the provisions of Art. 730, which reads:

> The relationship between an adopted child on the one hand and the adoptive parent and his blood-relations on the other ceases upon dissolution of adoption.
>
> If the adoptive parent has left the adoptive house, the relationship thereby ceases between such person and his blood-relations on the side of his or her original house on the one hand and the adopted child on the other.
>
> If the spouse of an adopted child or the latter's lineal descendants or their spouses have left the adoptive house together with the adopted child, owing to the dissolution of the adoption, the relationship thereby ceases between such persons on the one hand and the adoptive parents and the latter's blood-relations on the other.

7. *Consent of the Person under whose Protection one is Placed.*—As marriage is rightly considered to be one of the most important events of life, the law requires that any of the persons specified below shall obtain

[1] Civil Code, Art. 768. [2] *Ibid.* Art. 769. [3] *Ibid.* Art. 770.

the consent of the person under whose protection he or she lives, so that the step may be adopted with due care and deliberation:

(*a*) A man under full thirty years, or a woman under full twenty-five years, must obtain the consent of the father and mother belonging to the same house. When either the father or mother is unknown, or is dead, or has left the house, or is unable to express his or her intention, the consent of the other parent only is sufficient.[1] When a step-parent or *chakubo* (the wife of the father of a natural child who has been recognised by the father) refuses to consent, marriage may be effected with the consent of the family council instead.[2]

(*b*) A minor who has neither father nor mother to give consent to his or her projected marriage must obtain the consent of the guardian.[3]

(*c*) An incompetent person need not obtain the consent of the guardian.[4]

(*d*) A member of a house must obtain the consent of the head of the house.[5] But the consent in question is to be obtained out of respect due to the head of the house rather than as a condition of effective marriage. Therefore, even though marriage is effected without the consent in question, it does not form a cause for cancellation of the marriage, as the omission of any other condition does; the only sanction for non-compliance with the rule being that the head of the house may, within one year from the date of marriage, either exclude such member from the house or forbid his return to it.[6] Moreover, though the Registrar must not accept a notification of marriage which does not fulfil the essential conditions, he must accept a notification in case of a marriage contracted without the consent of the head of the house, provided the parties desire to make such notification notwithstanding that their attention has been called to the fact by him (the Registrar).[7]

Formal Conditions.—In Mediæval Europe, where the influence of religion was paramount and where marriage was a religious institution, religious ceremonies were an essential condition of marriage, therefore registration and all other matters relating to it fell to the charge of the priest. But owing to the tendency to separate secular and spiritual affairs, marriage, too, has gradually come to be regarded as a civil rather than a religious contract, so that in the eyes of the law religious ceremonies are not deemed to be important. As society progresses, originally formal juristic acts are generally apt to become informal; but in the case of marriage all nations seem to agree in considering it necessary that the parties, witnesses, and competent public officials should co-operate and certain formalities be gone through, so that the intention of the parties may be rendered clear and it may be easily and accurately ascertained that all the essential conditions

[1] Civil Code, Art. 772, 1 and 2.
[2] *Ibid.* Art. 773.
[3] *Ibid.* Art. 772, 3.
[4] *Ibid.* Art. 774.
[5] *Ibid.* Arts. 750 and 741.
[6] *Ibid.* Art. 750.
[7] *Ibid.* Art. 776.

have been fulfilled and evidence thereof permanently preserved. Under the French and German Civil Codes, a projected marriage is made public in order to ascertain whether there are any parties who have valid objections to it; and then certain ceremonies are gone through by the parties in the presence of the officials concerned and witnesses and the marriage is registered, and so on. In short, the whole process is somewhat tedious and over-complicated. But when the formalities required by law are too elaborate, many a couple may be induced to content themselves with simply living together as man and wife in reality without going through those troublesome formalities and becoming married in law as well as in fact—a result which is highly undesirable from a moral point of view. It is therefore advocated by many thinkers that marriage formalities should be simplified to the utmost possible extent, and this appears to be a social policy which should not be carelessly overlooked. In France, for example, considerable amendment has been made to the Book of Relatives in the Civil Code, and the formalities of marriage have been simplified to a very great extent. In drafting the Japanese Civil Code, it was the aim of the draftsmen to make the legal formalities as simple as might be compatible with the necessity of ascertaining the intention of the parties and making the act public. Thus, a notification to the Registrar is practically the only formal condition of marriage, and such notification may be made either orally or by a document signed by the parties and two witnesses of full age.[1] Under these circumstances, it is a matter of complete indifference whether nuptials have been celebrated according to social usage or not, or whether a notification is given before or after the consummation of the act—the time of the notification being always deemed to be the date of marriage. As a result, it not infrequently happens that the actual date of marriage does not agree with the date of the notification to the Registrar, but this is an unavoidable result of the arrangement under which marriage is treated as a legal institution, and the legal facts relating to it must be ascertained according to the notification thereof. It must, however, be admitted that, while mere notification suffices for all legal purposes, it is undesirable in the interest of good morals that so important a matter as marriage should be completely effected by mere notification. For this reason, in the case of marriages of members of the Imperial Family, the celebration of certain rites is legally required.[2] Even among the rank and file of the people, nuptials are, as a rule, celebrated with time-honoured ceremonies, but it would occupy too much space to describe them in detail. Another point to be noted in this connection is that, following the example set by Christian converts who solemnise their marriages *in facie ecclesiæ* in a consecrated church or chapel, an entirely new custom

[1] Civil Code, Arts. 775 and 776, and Arts. 102-4 of the Law concerning Family Registry.

[2] Ordinances concerning Marriages of the Imperial Family.

has been recently inaugurated of holding wedding ceremonies in temples dedicated to the Imperial Ancestress (the Sun-Goddess). The Shintō priests concerned find in the new observance a by no means despicable source of revenue which had never even been dreamt of by their poor predecessors in office in past times.

Exceptions to the Rules relating to Essential Conditions of Marriage.—(*a*) Marriages of members of the Imperial Family.[1] (*b*) A peer or a member of his house who desires to contract marriage must obtain the permission of the Minister of the Household.[2] (*c*) Marriages of military and naval men.[3] (*d*) In order to make a *nyūfu*[4] of a foreigner, the permission of the Home Minister must be obtained.[5]

Invalidity of Marriage.—Marriage is invalid where the expression of intention to get married does not take effect absolutely. When certain conditions are legally fixed for a certain act, it is naturally a rule that such act cannot be effectively done without fulfilling those conditions. But as marriage has a most serious effect on the status of persons, to render it void without particularly grave reasons would be not only prejudicial to the future career of the parties and of their offspring, but also be productive of unfavourable results to public welfare and good morals. For these considerations the cases where marriage is invalid are limited to (1) where there is no intention of getting married between the parties concerned owing to mistaken identity or any other reason, and (2) where the parties concerned have not notified the marriage—in short, where the basis is wanting on which marriage is founded.[6] Where marriage is contracted without fulfilling some legally prescribed condition, it is separately provided that the act can then be annulled.

Annulment of Marriage.—The Registrar must not accept a notification of a marriage until he has ascertained that the marriage fulfils all the legally essential conditions[7]; but in case he has carelessly accepted a notification and overlooked the fact of some condition or other being left unfulfilled, the marriage is nevertheless thereby validly formed. But while, for reasons mentioned in the preceding paragraph, it would be undesirable to render such a marriage void *ipso facto*, it would be tantamount to ignoring the intention with which certain conditions have been legally prescribed to treat a marriage as perfectly valid, even though it is defective in its formation.

[1] Ordinance concerning Marriages of Members of the Imperial Family.

[2] Arts. 14 and 17 of the Ordinance concerning Peers.

[3] Regulations concerning Marriages of Military Men in Active Service and Regulations concerning Marriages of Naval Men.

[4] "Nyūfu" means a man married to a female head of a house and taken into her house by a species of adoption.

[5] Law No. 22 of the year 1899.

[6] Civil Code, Art. 778 and Arts. 105 and 106 of the Law concerning Family Registry.

[7] Civil Code, Art. 776.

A remedy has therefore been provided in the Civil Code, according to which an expression of intention to contract matrimony which has once come into effect is annulled for the future by a decision of the Court upon the application of a person legally authorised to institute such an action for a reason specified in law. This is what is known as the annulment of a marriage.[1] A void marriage differs from an annulled marriage in that while the former is invalid *ab initio*, the latter is void only as regards the future, because the annulment of a marriage has no retroactive effect.[2] The annulment of a marriage, again, differs from divorce in that the cause thereof exists previous to the marriage. As certain conditions of marriage are provided for the protection of public interests, and others for the protection of private interests, so some of the causes for which marriage can be cancelled are absolute, while others are merely relative.

1. *Absolute causes* are reasons connected with public interests and exist where the continuance of a marriage is directly prejudicial to the public welfare. Where there is an absolute cause for annulment, such annulment can be demanded not only by each party concerned, but by the head of his or her house, his or her relatives, his or her spouse or former spouse, or a Public Procurator (who represents public interests), and the right of annulment is extinguished neither by prescription nor by ratification; but owing to the cessation of the said reason connected with public interests, it may sometimes happen that the right of annulment cannot be exercised after the expiration of a certain period. The absolute causes for annulment are (1) the marriage of a person who is not legally old enough to contract marriage, (2) bigamous marriage, (3) re-marriage before the expiration of the period within which such marriage is forbidden, (4) marriage between the parties to an adultery, and (5) marriage between two near relatives.[3]

2. *Relative causes* are reasons connected with private interests, and exist where the continuance of a marriage is prejudicial to the interests of some private person. Therefore, the right of cancellation is confined to the party whose interests are injured or threatened by the continuance of the marriage, and his right of annulment is extinguished by prescription or ratification. Such cause is (1) where marriage is contracted without the consent of the person under whose protection one lives or such consent is obtained by fraud or coercion,[4] (2) where marriage is contracted by fraud or coercion,[5] or (3) where in case of the adoption of a *muko-yōshi* (a man adopted as a son and at the same time as a husband to a daughter of the house), the adoption is invalid or cancelled.[6] The last-mentioned cause is of a somewhat different nature from the rest, but the marriage in this case can be cancelled because the marriage and adoption are interdependent.[7]

[1] Civil Code, Art. 779.
[2] *Ibid.* Art. 787.
[3] *Ibid.* Arts. 780-82.
[4] *Ibid.* Arts. 783 and 784.
[5] *Ibid.* Art. 785.
[6] *Ibid.* Art. 786.
[7] *Ibid.* Art. 858, Art. 813, No. 10, and Art. 866, No. 9.

Effect of Marriage.—Marriage calls into being the status of the husband and the status of the wife, and causes the wife to be subject to the power of the husband. Under the private laws of civilised countries, men and women, as a rule, stand on an equal footing, but the equality of the sexes does not necessarily constitute any reason why man and wife should be on an equal footing; therefore when a woman is married her capacity is legally restricted for the maintenance of order and peace in the household. In ancient times wives were entirely subject to the arbitrary authority of their husbands and were not allowed to enjoy property rights of their own, so that it was not necessary that the woman's power should be specially restricted; but now that the wife's personality is recognised it is necessary, or at least expedient, that her capacity should be restricted in certain respects. The acquisition of these several statuses are productive of various effects not only on the persons and properties of the husband and wife, but in regard to relationships and memberships of houses.

Effect of Marriage as regards Relationships.—Spouses and relatives by affinity within the third degree of relationship are, among others, deemed relatives.[1]

The same relationship as between parent and child arises between a step-father or mother and a step-child and between a *chakubo*[2] and *shoshi*.[3]

A *shoshi* acquires the status of a legitimate child by the marriage of its parents (*legitimatio per subsequens matrimonium*).

An illegitimate child recognised by its father and mother during the marriage acquires the status of a legitimate child from the time of the recognition.

The provisions of the preceding two paragraphs apply correspondingly in case the child is already dead.[4]

Effect of Marriage as regards Membership of a House.—The wife enters the husband's house.

A *nyūfu*[5] or a *muko-yōshi*[6] enters the wife's house.[7]

Those who are relatives of the head of a house and are in his house, and their spouses, are members of the house.

In case the head of a house is changed, the former head of the house and the members of his house are members of the house of the new head.[8]

When the female head of a house has been married to a *nyūfu*, the husband becomes the head of the house except, at the time of the marriage, the parties concerned have expressed a contrary intention.[9]

[1] Civil Code, Art. 725, Nos. 2 and 3.
[2] Wife of the father of a natural child who has been recognised by the father.
[3] A natural child who has been recognised by the father. Civil Code, Art. 728.
[4] Civil Code, Art. 866.
[5] A man who has married the female head of a house and been adopted into her family.
[6] A man who has been received as an adopted son, and who has married a daughter of the house into which he has been adopted.
[7] Civil Code, Art. 786. [8] *Ibid.* Art. 732. [9] *Ibid.* Art. 736.

If a husband enters another house or establishes a new house, his wife follows him into such house.[1]

When the head of a house desires to enter another house by marriage, resignation from the headship of the house may be effected with the permission of the Court by appointing an heir and obtaining his acceptance of the succession beforehand (should there be no heir presumptive to the house). In case the head of a house desires to enter another house by marriage without resigning from the headship of the house, if the Registrar has accepted the notification, the head of the house is regarded as having resigned from the headship of the house as on the day of the marriage.[2]

Effect of Marriage on the Persons of the Parties.—(*a*) The husband and wife are bound to be faithful to each other. It is owing to this mutual duty subsisting between them that adultery forms a cause of judicial divorce in the Civil Code[3] and of a certain penalty in the Criminal Code.[4] But under Japanese law this duty of chastity falls heavier upon the wife than upon the husband, the obvious reason being that the misconduct of the husband does not affect the blood and lineage of the family; but this is a point which will be more and more unfavourably commented upon as civilisation advances.

(*b*) The wife is bound to live with her husband, and the husband must permit the wife to live with him.[5]

(*c*) Husband and wife are mutually bound to support (maintain) each other.[6] In case there are several persons bound to furnish support to a person, his or her spouse must furnish support first of all[7]; and when there are several persons entitled to support from a person, he or she need furnish support to his or her spouse only if support having been furnished to his or her indigent lineal ascendants and lineal descendants first, he or she has yet ample means remaining over to maintain the spouse in need.[8]

(*d*) When the wife is in minority, her husband of full age acts as her guardian[9]; but in this case the husband, while by virtue of his power as such he exercises the same functions as guardian, does not become guardian in the full sense of the term, as when the wife is adjudged incompetent.

(*e*) If either husband or wife is adjudged incompetent, the other becomes his or her guardian.[10]

(*f*) A contract concluded between a husband and wife may be avoided by either of them at any time while married, because such contract is often due to an abuse of power on the part of the husband or an excessive love or passion of one for the other, so that it cannot be safely regarded as having been made according to the absolutely free intention of either party; and to have it legally binding on the parties would only serve to disturb or under-

[1] Civil Code, Art. 745.
[2] *Ibid.* Art. 754.
[3] *Ibid.* Art. 813, Nos. 2 and 3.
[4] Criminal Code, Art. 183.
[5] Civil Code, Art. 789 and Art. 813, No. 6.
[6] *Ibid.* Art. 790.
[7] *Ibid.* Art. 955, 1.
[8] *Ibid.* Art. 957, 1.
[9] *Ibid.* Art. 791.
[10] *Ibid.* Art. 902, 2 and 3.

mine the satisfactory relations between them. It is, however, a matter of course that the rights of third persons must not be injured by the cancellation of such contract.[1]

(*g*) A wife must have the permission of her husband to do any of the acts mentioned below:

1. To receive or invest capital;
2. To contract loans or to become surety;
3. To do acts having for their object the acquisition or loss of rights relative to immovables or to important movables;
4. To institute suits at law;
5. To make gifts, amicable settlements, or arbitration agreements;
6. To accept or renounce a succession;
7. To accept or renounce a gift or legacy;
8. To make a contract subjecting her to any corporal restraint.

Any of these acts done without the permission of the husband can be cancelled either by the husband or by the wife.[2] But (1) when it is uncertain whether the husband is alive or dead, (2) when the husband has deserted the wife, (3) when the husband is an incompetent person or a quasi-incompetent person, (4) when the husband is confined in a hospital or private house on account of insanity, (5) when the husband has been sentenced to a penalty of imprisonment for one year or a severer penalty and is undergoing such penalty, or (6) when the interests of the wife and the husband conflict (as when the wife brings an action for divorce or for any other purpose against the husband), the wife need not obtain the permission of her husband.[3]

Effect of Marriage on the Property of the Husband and Wife.—In order to explain the effect of marriage on the property of the contracting parties, it is necessary to discuss at some length the "Arrangements as to marital property" which are provided in Arts. 793-809 of the Civil Code. Arrangements as to marital property are rules by which the property relations of a husband and wife are governed while they lead a common conjugal life. When the personality of the wife was not fully recognised, the property of the wife vested in the husband as a matter of course, and it was then unnecessary to provide rules governing the property relations between husband and wife; but now that the personality of the wife is fully recognised, such rules have been laid down. And though it is just and reasonable that such relations should be determined according to the agreement of the parties, as a matter of fact such agreements are seldom made in Japan at the time of marriage. Hence the necessity of providing legal arrangements as to marital property.

Contracts as to Marital Property.—A husband and wife may, previous to the notification of their marriage to the Registrar, freely enter into a contract as to their property relations while married.[4] If they have made

[1] Civil Code, Art. 792.
[2] *Ibid.* Art. 1 2, and Art. 120, 2.
[3] *Ibid.* Art. 17.
[4] *Ibid.* Art. 793.

a contract different from the legally ordained arrangements as to marital property, it cannot be set up against their successors or against third persons unless it is registered previous to the notification of the marriage to the Registrar.[1] Such contract must, if at all, be made always previous to the notification of the marriage to the Registrar, and it cannot be altered subsequent to said notification, because a contract between a husband and wife cannot always be regarded as an outcome of the absolutely free intention of the parties,[2] and also because it is to be apprehended that a subsequent alteration in those property relations may result in defrauding third persons. Therefore, to conclude a contract as to marital property anew, to make the effect of such contract depend on a condition or term, and to insert therein an agreement that it may be subsequently altered, are all void acts. But in case a spouse who manages the property of the other endangers it by reason of mismanagement, the latter may apply to a Court to be allowed to undertake the management himself or herself; and as to common property, partition may also be claimed at the time of the application.[3] In case, again, foreigners have concluded a contract different from the legal arrangements as to marital property of the native country of the husband, if they acquire Japanese nationality or fix their domicile in Japan subsequent to their marriage, such contract cannot be set up in Japan against their successors or against third persons unless it is registered within one year.[4]

Legal Arrangements as to Marital Property.—If a husband and wife have not validly made a special contract as to their property, previous to the notification of their marriage to the Registrar, the arrangements as to marital property as provided in the Civil Code govern by operation of law,[5] the gist of which may be given as follows: Property owned by a wife or a *nyūfu* since previous to the marriage, and the property acquired in his or her name while married, forms his or her separate property. Property about which it is uncertain whether it belongs to the husband or wife is presumed to belong to the husband or to the female head of the house.[6] In this way the ownership of the property of the husband or the wife is not affected by marriage. All expenses arising from the marriage are to be borne by the husband or the female head of the house[7]; but on the other hand the husband or the female head of the house is entitled to use the property of his or her spouse according to its proper use and acquire profits therefrom, though he or she must pay out of the fruits of his or her spouse's property the interest on the obligations which the latter bears.[8] Certain provisions relative to loans for use apply correspondingly to said use and acquisition of profits.[9] The husband, as a rule, manages the wife's property. The same applies even

[1] Civil Code, Art. 794.
[2] *Ibid.* Art. 792.
[3] *Ibid.* Arts. 796-7.
[4] *Ibid.* Art. 795.
[5] *Ibid.* Art. 793.
[6] *Ibid.* Art. 807.
[7] *Ibid.* Art. 798.
[8] *Ibid.* Art. 799.
[9] *Ibid.* Art. 800.

as between a female head of a house and her *nyūfu*. But if the husband is unable to manage the wife's property, the wife does so herself as a matter of course.[1] When the husband desires to contract loans on behalf of the wife, to assign her property, to furnish it as security, or to let it in excess of the period provided in Art. 602 of the Civil Code, he must obtain the wife's consent; but this does not apply when the fruits of her property are disposed of for the purpose of management.[2] In case the husband manages the wife's property, a Court may, on the application of the wife, order the husband to furnish proper security with regard to the management and restitution of the property, should such course be deemed necessary.[3] Though the right of management generally vests in the husband in this manner, the wife is regarded as the representative of the husband with regard to the daily household affairs; but the husband may either entirely or partly decline to recognise such authority of representation, though such denial cannot be set up against third persons in good faith.[4] In case the husband manages his wife's property or the wife represents her husband, the same care must be used as for his or her own sake[5]; and certain provisions respecting mandates apply correspondingly to these relations.[6]

The above is a rough sketch of the provisions of the Civil Code as to the effect of marriage. In Europe, however, *Heirath macht mündig* has been a legal maxim since ancient times, according to which by marriage even a minor acquires the capacity of a person of full age. This rule has not been acted on in the French and German Codes, but the new Swiss Civil Code (in force on and after January 1, 1912) has adopted the maxim without any modification (Art. 14, 2).

[1] Civil Code, Art. 801.
[2] *Ibid.* Art. 802.
[3] *Ibid.* Art. 803.
[4] *Ibid.* Art. 804.
[5] *Ibid.* Art. 805.
[6] *Ibid.* Art. 806.

RECENT CASES ON THE CANADIAN CONSTITUTION.

[*Contributed by* A. Berriedale Keith, Esq., D.C.L.]

The Validity of Advisory Judgments.—A marked feature of Canadian constitutional interpretation in the last two years has been the large number of judgments of an advisory character on points of constitutional importance submitted to the Supreme Court by the Governor in Council. The question of the power of the Government of Canada to ask the Supreme Court to answer abstract questions was brought before the Privy Council at the end of 1911, and the decision [1] of the Judicial Committee was delivered on May 16, 1912. The power in question is conferred on the Government by enactments consolidated as s. 60 of the Supreme Court Act, Chap. 139 of the Revised Statutes of 1906, which authorises the reference to the Supreme Court by the Governor in Council of (*a*) important questions of law or fact touching the interpretation of the British North America Acts, 1867 to 1886; or (*b*) the constitutionality or interpretation of any Dominion or provincial legislation; or (*c*) the appellate jurisdiction, as to educational matters by the British North America Act, 1867, or by any other Act or Law, vested in the Governor in Council; or (*d*) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be executed; or (*e*) any other matter whether or not in the opinion of the Court *eiusdem generis* with the foregoing enumerations, with reference to which the Governor in Council sees fit to submit any such question. It is also provided that for the purposes of appeal to His Majesty in Council the opinion of the Court upon any such reference, although advisory only, shall be treated as a final judgment of the Court between parties.

The case came, in the first instance, before the Supreme Court of Canada, and it was held by a majority in that Court [2] that the power to refer validly existed. The grounds of the judgment of the Chief Justice were that a precedent had been established by the numerous previous cases in which the Court had answered such questions, some of the answers to which had been

[1] *Attorney-General for Ontario* v. *Attorney-General for Canada*, [1912] A.C. 571.
[2] 43 S.C.R. 536.

appealed to the Judicial Committee of the Privy Council, which assumed that it had jurisdiction to deal with them; that independently of precedent it was the duty of the Judges of the Supreme Court of Canada to advise the Executive Government in analogy to the procedure by which the judges in England had been called to give their opinion on points of law; and that Parliament had the necessary jurisdiction under s. 91 of the British North America Act to provide as it had done in the Supreme Court Act. The view of the Chief Justice was concurred in by Davies, Duff, and Anglin JJ. On the other hand, Girouard J. held that the jurisdiction of the Court in references by the Governor-General was confined to federal matters only, and in so far as the subject-matter of a reference was provincial, it was beyond the jurisdiction of the Court. Idington J. held that, while the Supreme Court had jurisdiction in references in which the Dominion and the provinces had agreed to the submission of the question asked, it had not jurisdiction to entertain a reference by the Dominion authorities of questions affecting the provinces without the consent of the provinces.

An appeal was brought from the decision by special leave. The decision of the Privy Council was in favour of the validity of the law. They held that the British North America Act, 1867, must be held to have divided between the Dominion and the provinces every point of internal self-government. Cases of apparent overlapping of powers were possible, and it was the duty of a Court of Law to decide in each case on which side of the line the power in question fell. In this case, however, the contention against the validity of the Act was not that the power of asking such questions belonged exclusively to the provinces, but that no legislature in Canada had the right to pass an Act for asking such questions at all. It was argued that the power to ask questions of the Supreme Court was so wide in its terms as to admit of a gross interference with the judicial character of the Court, and therefore of grave prejudice to the rights of the provinces and of individual citizens. Although no direct effect was to be given to such judgment, nevertheless it was not in human nature to expect that the members of the Court could divest themselves of the pre-conceived notions which they had formed on the subject-matter, and though provision was made in the Act to require an argument, yet the persons who would actually be affected by the answers could not be known beforehand and might be seriously prejudiced. These arguments, the Judicial Committee held, had a two-fold aspect. In the first place, they might be regarded as commenting on the wisdom of such an enactment, but that was a matter for the determination of Parliament, for no Court could have a word to say as to the wisdom or expediency of an Act validly passed. In the second place, it must be presumed that the constitution of Canada gave either to the Dominion or to the provinces whatever belonged to self-government in Canada. The British North America Act did not give the power in express language, and the question arose whether there was any-

thing in the Act to deprive Parliament of the right of giving to the Executive Government the power to ask the Court for its opinion.

It was argued for the provinces that when a Court of Appeal was authorised to be set up by s. 101 of the Act it was intended that the Court should be a judicial body, and that the duty of answering questions deprived the Court of such a characteristic. It appeared that the idea of questions being put to the Supreme Court by the Government was suggested by s. 4 of the Act of William IV. regarding the Privy Council, as the earliest Canadian Act on the subject, that of 1875 establishing the Supreme Court, adopted in effect the words of that section. On the other hand, it was true that the members of the Judicial Committee were all Privy Councillors, bound as such to advise the Crown. On the whole, however, it was strange that a Court, for such in effect the Judicial Committee was, should have been liable for three-quarters of a century to answer questions put by the Crown, and should have done it without the least suggestion of inconvenience and impropriety, and yet that the same thing when attempted in Canada deserved to be stigmatised as subversive of the judicial functions of the Court. As regards the House of Lords it was clear on the one hand that in their judicial capacity that House could summon the judges, and ask them questions which it considered necessary for the decision of a particular case, and on the other hand it had been asserted that the House of Lords in its legislative capacity could ask the judges how the law stood, but whether or not the latter right existed, as it might be regarded as part of the privilege of the House of Lords and therefore not in point in the case of a power claimed for a Parliament under a written constitution, it was unnecessary to consider it further. Little assistance could be afforded by the almost obsolete practice of His Majesty's judges in England being questioned by the Crown as to the state of the law. The last occasion when an answer was given was in 1760, and as the unwritten custom of England was a growth, not a fixture, it might be that desuetude for 150 years had rendered unconstitutional any attempt to repeat such an experiment. In the case of Canada the power had been given to the Executive in 1875, further legislation had been passed in 1891 and in 1906, and in six cases between 1875 and 1912 the answers of the Supreme Court had been carried on appeal to the Judicial Committee. It had been argued for the provinces that the question of the right to carry these cases of appeal had not been raised in any instance, but it was improbable that the Judicial Committee would have failed even to refer to a departure so serious as was now maintained from what was due to the independence and character of Courts of Justice. Moreover, it was important to note that nearly all the provinces had passed Acts requiring their Courts to answer questions in terms somewhat similar to the Dominion Act. It was difficult to resist the conclusion that the point now raised would never have been raised had it not been for the nature of the questions which had been

put to the Supreme Court. The Supreme Court itself, however, could either point out in its answer that the questions could not be answered exhaustively and effectively without so many qualifications as to make the answers of little value, or it could make the necessary representations to the Governor in Council, and the Parliament of Canada could control the action of the Executive. The Judicial Committee, while pointing out the mischief and inconvenience which might arise from an indiscriminate and injudicious use of the Act, and leaving it for the consideration of those who alone were lawfully and constitutionally able to decide such a matter, advised that the appeal ought to be dismissed.

Laws relating to Marriage.—The ground on which the validity of the Act was questioned was the fact that the Dominion Government had decided to refer to the Supreme Court the question of the powers of the Dominion and the provinces respectively to enact laws dealing with marriage. The decision arose out of a decision of the Quebec Courts as to the validity of a marriage which had not been performed with the ordinary religious formalities customary in marriages of Roman Catholics, and for various reasons the matter had been made a political issue. The Supreme Court of Canada delayed the hearing of the actual reference pending the discussion of the question of the right to refer such matters at all, and on the giving of the decision in May 1912, proceeded in turn to deal only with the reference. The case was heard by the Chief Justice and Davies, Duff, Idington, and Anglin JJ.

The first question asked was whether the Parliament of Canada had authority to enact in whole or part Bill No. 3 of the First Session of the Twelfth Parliament of Canada, entitled "An Act to Amend the Marriage Act," and if the provisions of the Bill were not all within the authority of the Parliament of Canada to enact, which, if any, of the provisions were within the authority.

The terms of the Bill were understood by the Court as an attempt to validate by Dominion legislation marriages solemnised by or before a person having only a limited provincial authority to solemnise marriages, in cases where such person had ignored the limitations, and had attempted to solemnise a marriage beyond the powers given by the provincial legislature, and on this understanding of the intention of the Bill, the Chief Justice and Duff, Anglin, and Davies JJ. were clearly of opinion that the proposal was *ultra vires* the Dominion Parliament. They considered that to give this effect to the Bill would be to interpret the British North America Act, 1867, as empowering the Dominion Parliament to deal with marriage in all its extent and as leaving to the legislatures of the provinces merely the right to regulate matters of form, the neglect of which would expose the parties to penalties under the provincial Acts, but would not affect the validity of the marriage. This view was based on the theory that the contract of marriage was entirely independent of any religious or other ceremonial, but

in all probability the British North America Act had been framed in order to leave to the provinces the power of deciding the manner in which marriages should validly be contracted. The Act should be regarded as conferring on the provincial legislatures the full power of deciding what ceremonials, religious or otherwise, were necessary, and if ceremonials were required by provincial enactments and were not observed the marriage was *ipso facto* void, and could not be rendered valid by the Dominion Parliament. This interpretation would leave a perfectly clear field for the action of the Dominion Parliament and for the action of the provincial legislatures, and this view was supported by the principles laid down by the Law Officers of the Crown in England in 1870, who held that the solemnisation of marriage belonged exclusively to the provinces, while the regulation of the status of marriage and of the destruction of that status belonged to the Dominion.

Idington J. also considered that the Bill as it stood was *ultra vires*. He thought that so far as the Bill was retrospective it might be valid as part of a scheme for concurrent legislation by Parliament and by the legislatures to confirm past marriages which probably neither could effectively do. So far as it was prospective, it was possible that it was valid in so far as it prohibited any religious test, but that was doubtful, and another form of legislation would be more satisfactory.

The second question put to the Court was whether the law of the Province of Quebec rendered null and void, unless contracted before a Roman Catholic priest, a marriage which would otherwise be legally binding and which took place in that province firstly between persons who were both Roman Catholics, and secondly between persons of whom one only was a Roman Catholic.

The first part of the question raised the same matter as had been dealt with by the judgment of the Quebec Court in the *Hébert Case*, and as the Government of Quebec were not anxious that the matter should be dealt with by the Supreme Court, the Chief Justice considered himself justified in declining to give an opinion, especially as such opinion would be advisory only and might be embarrassing without being of substantial assistance.

On the other hand Idington, Duff, and Davies JJ. were unanimously of opinion, in accordance with the judgment [1] of Mr. Justice Charbonneau, that the law of Quebec did not require the presence of a Roman Catholic priest whether the two persons contracting the marriage were Roman Catholic or whether one only was a Roman Catholic, thus showing that in their opinion the decision of Mr. Justice Laurendeau in the *Hébert Case* was a mistaken one. Anglin J., however, held that in the case of two Roman Catholics the law of Quebec did require the presence of a Roman Catholic priest, but that in cases of mixed marriages no such requirement existed.

The third question asked the Court was in effect answered by the replies to the first and second. The Court was required to advise, in the event of

[1] 2 R.J. 41 C.S. 249.

either or both of the first two questions being answered in the affirmative, whether the Parliament of Canada had authority to enact that all such marriages, whether solemnised hitherto or hereafter to be solemnised, should be legal or binding.

The Chief Justice and Anglin, Duff, and Davies JJ. were unanimously of opinion that the Parliament had no such power, while Idington J. considered that with regard to marriages hitherto solemnised the legislation was valid, provided it were accompanied by concurrent legislation in the provinces, and as regards future marriages it would be valid in cases in which the provinces failed to provide a suitable mode of solemnisation.

From the decision of the Supreme Court of the Dominion an appeal was brought to the Judicial Committee of the Privy Council by special leave. The Government of the Dominion and the Governments of the Provinces of Ontario and Quebec appeared before the Committee. The same questions were submitted to the Judicial Committee as had been submitted to the Supreme Court.

The judgment of the Judicial Committee[1] was delivered by the Lord Chancellor, who pointed out that the question turned entirely upon the effect of the provisions of ss. 91 and 92 of the British North America Act. The original controversy between the parties was as to whether all questions relating to the validity of the contract of marriage, including the conditions of that validity, were within the exclusive jurisdiction conferred on the Dominion Parliament. If so, then the provincial power extended only to the regulation of formalities, and did not extend to any question of validity.

On the other hand it was contended that the power given by s. 91 was reduced by s. 92, and that the legislatures of the provinces had the exclusive capacity to determine by whom the marriage ceremony might be performed, and to make the officiation of the proper person a condition of the validity of the marriage.

If the latter view was taken it was clear how the questions must be answered, for it was agreed between counsel that the Bill referred to in the first question was enacted to enable a person with any authority to perform the ceremony, to perform it validly whatever the religious faith of those married by him. On the footing indicated the Bill would therefore be *ultra vires* of the Dominion Parliament, and the third question would also be disposed of, for the Parliament of Canada would in the event indicated have no authority; the second question consequently became not only unimportant but superfluous.

Notwithstanding the argument addressed to them, the Judicial Committee arrived at the conclusion that the jurisdiction of the Dominion Parliament did not on the true construction of ss. 91 and 92 cover the whole field of validity. The provision in s. 92 conferring on the provincial

[1] *In re Marriage Legislation in Canada*, [1912] A.C. 880.

legislature exclusive power to make laws relating to the solemnisation of marriage in the province operated by way of exception to the powers conferred as regards Parliament by s. 91 and enabled the provincial legislature to enact conditions as to solemnisation which might affect the validity of the contract. There had doubtless been periods where the validity of the marriage depended on the bare contract without reference to any solemnity, but in other cases the contrary doctrine prevailed, as in the common law of England and the law of Quebec before Confederation, which would naturally have been in the minds of those who inserted the words about solemnisation into the statute. *Prima facie* these words appear to import that the whole of what solemnisation ordinarily meant under the laws of the provinces of Canada at the time of Confederation was intended to come within them, including conditions which affected validity. This conclusion disposed of the questions raised.

Less immediately controversial than the marriage question but of greater practical importance is an issue which has gradually been coming into greater prominence, the question of Dominion and provincial control over companies. The passing of Acts by the provincial legislatures purporting to authorise companies to carry on business outside their province of incorporation has been the subject of comment by successive Ministers of Justice in their reports on the question of the allowance of provincial legislation, while on the other hand the provinces have questioned the right of the Canadian Parliament to attempt to control all provincial companies in insurance matters, and have asserted their own authority to regulate the proceedings of companies incorporated by the Dominion Parliament. The matter is of financial importance to the provinces, as they derive considerable sums from fees on companies, and the conflict of jurisdiction is of importance to foreign companies seeking to do business in the Dominion.

Company Legislation.—Under the powers given by s. 60 of the Supreme Court Act (Revised Statutes of Canada 1906, Chap. 139) the Governor-General in Council referred to the Supreme Court the following questions regarding the incorporation of companies in Canada.[1] The questions referred were:

(1) What limitation exists under the British North America Act, 1867, upon the power of the provincial legislatures to incorporate companies? What is the meaning of the expression "with provincial objects" in s. 92, Art. 11, of the said Act? Is the limitation thereby defined territorial, or does it have regard to the character of the powers which may be conferred upon companies locally incorporated, or what otherwise is the intention and effect of the said limitation?

(2) Has a company incorporated by a provincial legislature, under the powers conferred in that behalf by s. 92, Art. 11, of the British North

[1] 48 S.C.R. 331.

America Act, 1867, power or capacity to do business outside of the limits of the incorporating province? If so, to what extent and for what purpose? Has a company incorporated by a provincial legislature for the purpose, for example, of buying and selling and grinding grain the power or capacity, by virtue of such provincial incorporation, to buy or sell or grind grain outside of the incorporating province?

(3) Has a corporation constituted by a provincial legislature with power to carry on a fire insurance business—there being no stated limitation as to the locality in which the business may be carried on—power or capacity to make and execute contracts (*a*) within the incorporating province, insuring property outside of the province? (*b*) outside of the incorporating province insuring property within the province? (*c*) outside of the incorporating province insuring property outside of the province? Has such a corporation power or capacity to insure property situate in a foreign country or to make an insurance contract within a foreign country? Do the answers to the foregoing inquiries, or any and which of them, depend upon whether or not the owner of the property or risk insured is a citizen or resident of the incorporating province?

(4) If in any or all of the above-mentioned cases (*a*), (*b*), and (*c*) the answer be negative, would the corporation have throughout Canada the power or capacity mentioned in any, and which, of the said cases on availing itself of the Insurance Act, 1910 (9 & 10 Ed. VII. Chap. 32, s. 3 (3))? Is the said enactment—the Insurance Act, 1910, Chap. 32, s. 3 (3)—*intra vires* of the Parliament of Canada?

(5) Can the powers of a company incorporated by a provincial legislature be enlarged and to what extent, either as to locality or as to objects, by (*a*) the Dominion Parliament? or (*b*) the legislature of another province?

(6) Has the legislature of a province power to prohibit the companies incorporated by the Parliament of Canada from carrying on business within the province unless or until the companies obtain a licence so to do from the Government of the province or other local authority constituted by the legislature if fees are required to be paid upon the issue of such licences?

(7) Is it competent to a provincial legislature to restrict a company incorporated by the Parliament of Canada for the purpose of trading throughout the whole Dominion in the exercise of the special trading powers so conferred or to limit the exercise of such powers within the province? Is such a Dominion trading company subject to or governed by the legislation of a province in which it carries out or proposes to carry out its trading powers limiting the nature or kinds of business which corporations, not incorporated by the legislature of the province, may carry on or the powers which they may exercise within the province, or imposing conditions which to be observed or complied with by such corporations before they can engage in business within the province? Can such a company so incorporated by the Parliament of Canada be otherwise restricted in the exercise of its

corporate powers or capacity, and how and in what respects, by provincial legislation?

The decision of the Supreme Court on these questions was not given until 1913. The Chief Justice[1] held that the general answer to the first two questions was that the words "provincial objects" in s. 92, sub-s. 11, were intended to be restrictive. Companies incorporated by local legislatures were limited in their operations to the territorial area over which the incorporating legislature had jurisdiction. Comity could not enlarge the capacity of a company where that capacity was deficient by reason of the limitations of its charter or of the constituting power. This rule did not imply that a provincial company might not in the transaction of its business contract with parties outside of the province in matters ancillary to the exercise of its substantive powers.

As regards the third and fourth questions, the Parliament of Canada alone could constitute a corporation with powers to carry on its business throughout the Dominion, and two or more provinces by joint action could not extend the powers of a provincial corporation so as to cover the field assigned to the Dominion by the British North America Act. It followed, therefore, in reply to question (5) that neither another province nor the Dominion could enlarge by consent or comity the capacity which a company had received from the incorporating province.

As regards questions (6) and (7), the right of the province to restrict the operations of the Dominion companies by the imposition of a licence fee had been established by the Judicial Committee,[2] but it had equally clearly been established[3] that a province could not exclude a Dominion company from its territory, and it could not do indirectly what it was precluded from doing directly; and to require a licence to be obtained, not for revenue purposes, but in reality to shut out the operations of such a corporation, was not within the power of the provincial legislature. The legislature might require that foreign corporations should be registered, and file evidence of their corporate powers and so forth under penalties, but that was quite different from legislation which was intended to prevent, or have the effect of preventing, the operation of foreign companies within the territory of the province.

Davies J.[4] pointed out that the words "with provincial objects" in s. 92, sub-s. 11, raised the question whether the limitation was territorial or related to the subject-matter. Among the classes of subjects assigned exclusively to the Dominion Parliament, the incorporation of companies, other than banking companies, was not expressly mentioned, but it must be

[1] 48 S.C.R. 331, at pp. 339 *et seq.*

[2] *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575; *Brewers' and Maltsters' Association* v. *Attorney-General for Ontario*, [1897] A.C. 231.

[3] *La Compagnie Hydraulique de St. François* v. *Continental Heat and Light Co.*, [1909] A.C. 194.

[4] 48 S.C.R. 331, at pp. 342 *et seq.*

assumed to be granted; and it had been held by the Privy Council that the Parliament of Canada could alone constitute a corporation with powers to carry on its business throughout the Dominion, and it had also been laid down that a company incorporated by the Dominion Parliament could not be restrained from operating under its statutory powers at the suit of an appellant company which, under later Quebec statutes, had the exclusive power of so operating. This decision applied, in his opinion, both to legislation under the general powers of the Dominion Parliament as well as under the enumerated powers, for otherwise the decision of the Judicial Committee in the liquor prohibition case[1] in 1896 could not be explained, and such a construction of the Act would practically deny to the Dominion Parliament power to grapple effectively with any great national evil. The enumerated powers of the provincial legislatures showed clearly that they were not intended to operate beyond provincial limits. The limitation "with provincial objects" in his opinion had reference, not only to the area within which the company might operate, but also to the subject-matter over which exclusive legislative jurisdiction was conferred on the provinces by s. 92. To accept the contention of the provinces would be to admit that a provincial company could carry on business throughout Canada with the permission of the other provinces just as effectively as a Dominion company could do, though in virtue of a different authority. His view would not prevent the company carrying on ancillary operations outside a province, and this consideration would obviate some of the inconveniences upon which arguments had been based.

The answer of Sir L. Davies to the third, fourth, and fifth questions was accordingly in the negative. The sixth and seventh questions were, in his opinion, impossible to answer categorically and would depend upon the form of the legislation.

Idington J.[2] pointed out that the questions raised could only be properly solved by the march of events, both political and judicial, and that the giving of general answers was open to serious difficulties. He called attention to the historical facts, which showed that there had been no real intention to restrict provincial corporations from carrying on operations beyond provincial limits, and he laid stress on the fact that a financial disaster of great magnitude might result from a decision that "provincial objects" implied a territorial limitation. In his view a provincial legislature could not incorporate a company to do any of the things which lay within the exclusive power of Parliament, but each corporate creation had inherently in it, unless specifically restricted by the conditions of the instrument creating it, the power to go beyond the limits of the province for such purposes and transactions as were needed to give due effect to the business operations of the company so far as within the scope of the object of its creation.

[1] *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A.C. 348.

[2] 48 S.C.R. 331, at pp. 358 *et seq.*

The third question he answered in the affirmative, always provided that there had been no restriction placed by the charter of the company upon its doing so and no prohibition in the foreign state or province invalidating such contracts, and that the company has a firm or seat of business in the creating province to which the authorisation of such transaction must be attributed. The company's by-laws or regulations empowering its agents to act abroad must define the details to be observed in the execution of such contracts.

As regards the fourth question, he could not hold that the sub-section of the Insurance Act was entirely *ultra vires*, as it might for some purposes be read as part of concurrent legislation, but as it stood the last part of it must be held to be *ultra vires*, for the power did not extend to the enabling corporations to do anything beyond the powers given them by their respective creators.

With regard to the fifth question, he did not think it was competent for any legislature, save that creating a corporation, so to interfere with a corporation's powers and capacities as to add to or diminish them unless by the consent of all concerned.

As regards the sixth question, the matter depended upon the nature of the companies incorporated by Parliament. It was never intended that Parliament should by any Act of incorporation resting merely upon its residual power be entitled to over-ride or control the legislative powers of the provinces or to deal with any of the subject-matters exclusively assigned to the provinces. Companies which were incorporated by Parliament within its twenty-nine enumerated subjects of control could not be prohibited from doing anything which Parliament willed that they should do. Other companies incorporated under the residual authority of Parliament must stand before the provincial legislatures on the same footing as other persons, subject to the powers of these legislatures in regard to licensing, to taxation, and to property and civil rights. This was perfectly clearly the effect of s. 92, sub-s. 13, and the last sentence of s. 91 of the British North America Act. The effect of these provisions was to give the provincial legislature full power over property and civil rights subject to the exercise by Parliament of the enumerated powers in clause 91. The main argument against this view was the power of Parliament to regulate trade and commerce under sub-s. 2 of s. 91. This power would enable the Parliament to provide for the adjustment of the tariff, and the legislation within s. 132 of the British North America Act to carry out conventions with foreign countries might require to be supplemented by legislation falling under sub-s. 2 of s. 91. The term could not be meant to apply to trade and commerce generally because many of the heads of trade and commerce were expressly mentioned in s. 92 as subjects of exclusive power. It was also impossible to argue that the power included the right to deal with inter-provincial trade. Before federation the provincial companies were free to carry on business in other provinces, and any ill-effects that

might arise from such legislation could be avoided by the use of the Dominion power of disallowance under s. 90 of the British North America Act. This power, though perhaps disused, was nevertheless a beneficent power which was capable of great good service in the case of legislation which might improperly affect Dominion companies. It was perfectly reasonable that the provinces should be left to deal with companies, as they were best fitted to deal with matters intimately affecting the life and welfare of the people, and the substitution of companies authorised by the Dominion alone in place of provincial companies would be a breach of the federal system. The united action of both the Dominion and the provinces was doubtless necessary for the effective regulation of companies, and both provincial and Dominion legislation should be preserved. Undesirable provincial legislation could be dealt with by the veto power. In view of all these considerations, he could see no valid constitutional objections to a reasonable provincial Act providing for registration and information and taxation.

As regards the seventh question he had nothing to add to what he had already said except that in the *Telephone Case*[1] the paramount power of the Dominion Parliament fell under sub-s. 29 of s. 91 and not under sub-s. 2; and if the doctrine apparently laid down in the *Hydraulic Case*,[2] that the Dominion Parliament could in matters not resting on its exclusive authority prevail over the provincial authority, was to stand, then there was not in the Act any restraint upon Parliament such as people for a lifetime had believed there was, and to secure which a confederation was brought about.

Duff J.[3] held that the intention of sub-s. 10 of s. 92 was to give the power to the legislatures to incorporate companies to carry on any business which fairly fell within the description "provincial business." He thought that this resulted from the judgment in the case *The Citizens' Insurance Company* v. *Parsons*.[4] If the business were territorial then it would clearly be provincial; but it might still be provincial if a grain merchant carried on his business by places of business confined to one province, but bought the grain outside and sold the grain outside the province. On the other hand, if there were places of business in different provinces it could not be a provincial business, the test being whether the business looked at as a whole remained provincial in essence or not. This was the view which apparently was taken by Sir Oliver Mowatt in 1897 as regards a Nova Scotia Act which gave a company authority to acquire, cultivate, improve, and sell land not only in Nova Scotia but in New Brunswick and elsewhere.

As regards the third question, he did not consider it necessarily incompatible with the restriction as to provincial business that a company should make such contracts: the company could insure property situated in a foreign country, and make contracts within a foreign country, irrespective of the position of the owner of the property.

[1] [1905] A.C. 52.
[2] [1909] A.C. 194.
[3] 48 S.C.R. 331, at pp. 394 *seq.*
[4] 7 App. Cas. 96.

As regards the fourth question, since the main enactments of the Insurance Act were *ultra vires*, the ancillary provisions fell with them.

As regards the fifth question, the Dominion Parliament could not, under its general powers, enlarge the powers of a company incorporated by a provincial legislature, nor could the legislature of another province do so.

As regard questions (6) and (7), the answer was, in his opinion, "Yes" as regards (6)—so far as companies incorporated under the general authority of the Dominion were concerned—and his answer also was in the affirmative as regards (7) in respect of companies carrying on business which, if carried on in a single province, would not be subject to the exclusive authority of the Dominion Parliament.

The companies which owed their corporate character to the Dominion authority were not subject, as regards that character, to provincial legislation; but otherwise they were not a privileged class exempt from the jurisdiction of the provinces in relation to matters assigned exclusively to the provinces. Save as regards the questions included in the subject-matter of the incorporation of companies, a Dominion company was subject to the provisions enacted by the provincial legislatures. The arguments to the contrary were based, in his opinion, on misunderstanding of certain of the cases. It had been contended, on behalf of the manufacturers' association, that the licensing provisions of the provincial Acts were not passed in a real exercise of provincial jurisdiction, but to embarrass Dominion corporations in the conduct of their business in the provinces. The motives of legislation could not be taken into account, the proper remedy in such cases being disallowance by the Governor-General in Council; and the history of the Acts which were under consideration showed that the Dominion Government had not considered that the Acts were seriously objectionable in point of substance.

A further contention had been made to the effect that either in exercise of its general legislative authority or under sub-s. 2 of s. 91 the Dominion Parliament could legislate in such a way as to exempt companies incorporated for trading throughout Canada from provincial authority. The argument was to the effect that the Dominion had in some way authority to legislate in respect of matters truly of national interest and importance, and that under this head such legislation could be passed referring to companies which, if it came into conflict with provincial legislation, must prevail. The principle was of great practical importance, as it would result that, in matters which might appear to the Courts to be truly of national interest and importance, the Dominion possessed plenary power to make laws which in each province would supersede provincial legislation upon the subjects enumerated in s. 92, a principle which would leave to the provinces very little local autonomy. This principle had been deduced from the following cases.

The first was the drink legislation. The decision in *Russell* v. *The Queen*[1]

[1] 7 App. Cas. 829.

proceeded on the proposition that the Canada Temperance Act of 1878 could not be regarded as a law relating to property and civil rights. It could, therefore, be deduced that uniform legislation by the Parliament of Canada, imperative throughout the Dominion, relating to matters which would fall within any of the first fifteen heads of s. 92, could not be sustained under the general power to make laws for the peace, order, and good government of Canada. Even, however, if it were assumed that the legislation in question should be regarded as falling under sub-s. 16 of s. 92, in the *Prohibition Case*[1] the Judicial Committee seemed to have felt difficulty in holding that the Canada Temperance Act of 1886 (re-enacting the Act of 1878) was valid under the general power of the Dominion Parliament, and they had actually regarded as invalid an earlier Act, 46 Vict. chap. 30, which professed to establish a uniform system regulating instead of prohibiting the drink trade throughout Canada. The conclusion could, therefore, be deduced that the Dominion Parliament could not override provincial legislation in these cases.

In the *Hydraulic Company Case*[2] it appeared that counsel in the Court of King's Bench had admitted the validity of the Dominion legislation, and that the judgment of the Privy Council had proceeded on that basis. The Privy Council must be held to have assumed that the Dominion legislation was made under sub-s. 10 of s. 92 and therefore was no authority for the powers of the Parliament of Canada under its general legislative authority.

As regards the question of the powers of the Dominion to regulate trade and commerce, the extent of that authority was doubtful, and apparently, except in exceptional circumstances, the Dominion could not confer powers upon a Dominion company under that sub-section to be exercised in derogation of provincial legislation. It could not be held that the enactments in question related to inter-provincial trade, and it must be left for a concrete case to say whether conflicting Dominion legislation under sub-s. 2 might, in some case, over-ride provincial legislation.

Anglin J.[3] after calling attention to the difficulties of the position as regards answering hypothetical questions, considered that sub-s. 11 of s. 92 had been inserted to preclude the contention that if the power of incorporation should be regarded as a substantive and distinctive head of legislative jurisdiction, it was wholly vested in the Dominion Parliament as part of the residual power because it was not expressly mentioned in the enumeration of provincial powers, and the words "with provincial objects" were added to preclude the contention that the exclusive legislative power expressed in sub-s. 11 covered the whole field of incorporation, and to exclude from provincial jurisdiction the incorporation of companies for the carrying on of works and operations within the legislative jurisdiction of Canada. It had been argued that a provincial company charter must imply a limitation of the powers of the company to the territory of the province, but there was nothing in his opinion in the British North America Act to preclude a company

[1] [1896] A.C. 348. [2] [1909] A.C. 194. [3] 48 S.C.R. 331, at pp. 447 *et seq.*

incorporated by a province without territorial limitation to avail itself of the comity of a foreign state or of a province which recognised the existence of foreign corporations and permitted their operations in its territory. The exercise of such powers depended not upon the legislative power of the incorporating country, but upon the absence of any prohibition on the part of that legislature against taking advantage of international comity, and the express or tacit sanction of the state or province in which the powers were exercised. The doctrine of comity was fully recognised when the British North America Act was passed, and the term "with provincial objects" had a perfectly satisfactory meaning if it excluded from the provincial power of incorporation companies with distinctively Dominion objects. A Dominion company was a domestic company in the whole of Canada, whereas a provincial company was a foreign country in any other province; the former exercised its powers as of right and the latter by comity. A Dominion company was subject normally to the ordinary law of the province, to the law of mortmain, to taxation, to reasonable provisions in regard to registration and licensing, but still was entitled to the free exercise of its own powers. It might be that there was some distinction between companies created under the general legislative authority and companies created under the special heads of authority, but on that branch of the subject he desired to reserve his opinion. The granting of a charter which purported in terms to authorise the carrying on of business outside the province was *ultra vires* of the provincial legislature because it was an attempt to enable the corporation to exercise its powers as of right in parts of the Dominion not subject to the jurisdiction of the legislature. No provincial legislature could extend the powers of a company created by another provincial legislature. All that it could do was to re-incorporate it, that is, create another and distinct corporate body. Legislation of the Dominion Parliament which authorised a provincial company to effect matters or things, *e.g.* an Act permitting a provincial railway to erect a bridge over a navigable river, was in furtherance of that purpose and something which the incorporating province must have been taken to have contemplated and sanctioned, and not an enlargement of its powers or capacities obnoxious to the exclusive jurisdiction of the provincial legislature over its corporate creature.

The answers which he, therefore, gave to the questions were as follows:

(1) The legislature of a Canadian province could not validly incorporate a company which was (*a*) expressly empowered to exercise its activities in any other part of Canada and abroad; or (*b*) empowered to carry on works or operations within the enumerated legislative powers of the Dominion Parliament or business or affairs "unquestionably of Canadian interest and importance."

The answer to question (2) was in the affirmative, subject to the general law of the state or province in which the company sought to operate, and to the limitations imposed by its own constitution, but not by virtue of the powers conferred by its provincial incorporation.

The answer to question (3) (*a*) and (*c*) was in the affirmative, unless the company were forbidden by its constitution to insure such property. The answer to (*b*) was in the affirmative, and in no case was the nationality or residence of the owner of the property insured material.

The answer to question (4) was that the provision of the Insurance Act was *ultra vires* of the Parliament of Canada.

The answers to question (5) were in the negative.

In the case of question (6) the answer was in the affirmative if the real and primary object of the provincial legislation was the raising of a revenue or the obtaining of information, but not if the real and primary object were to require the company to obtain provincial sanction or authority for the exercise of its corporate powers.

As regards question (7), the answer to the first part was in the negative, and the answer to the second part was that a Dominion trading company was not subject to the legislation of a province limiting the nature and kind of business which corporations not incorporated by the legislature might carry on or the powers which they might exercise within the province.

Brodeur J.[1] held that the intention of the confederation delegates was that companies which did not relate to matters assigned to the central authority should be incorporated by the provinces. The word "provincial" in sub-s. 11 of s. 92 had therefore no reference to territory, but to objects which the provincial legislature could authorise or confer. A provincial company by comity would be allowed to carry on business in other provinces just as much as a bank incorporated by the Dominion Parliament could carry on business in a foreign country. No province could extend the competency of a company created by another province. His answer, therefore, to question (1) was that the "provincial objects" referred to the distribution of legislative power between the Parliament and the legislatures.

To question (2) he replied in the affirmative, subject to the laws of the country or province in which a provincial company might desire to operate, and subject to the limitations imposed by its own constitution.

His answer to question (3) was similar to that to question (2), and to the second part of question (4), that the terms in question of the Insurance Act of Canada were *ultra vires*.

To question (5) he replied that the powers of a company incorporated by provincial legislature could not be enlarged by either the Dominion Parliament or a provincial legislature.

The reply to question (6) was in the affirmative, and to question (7) that a trading company was subject to provincial laws under s. 92 of the British North America Act.

The Validity of the Insurance Act of Canada.—In addition to the reference with regard to the general powers of companies a special reference was made by the Governor-General in Council as to the validity of s. 4 and

[1] 48 S.C.R. 331, at pp. 461 *seq.*

s. 70 of the Insurance Act, 1910, of the Dominion Parliament.[1] It was also asked whether s. 4 of that Act operated to prohibit an insurance company incorporated by a foreign state from carrying on the business of insurance within Canada if such company did not hold a licence from the Minister under the Act, and if such carrying on of the business was confined to a single province. S. 4 of the Act provides that no company or underwriters or other person shall solicit or accept any risk, or issue or deliver any receipt or policy of insurance, or grant any annuity on a life or lives, or collect or receive any premium, or inspect any risk, or adjust any loss, or carry on any business of insurance, or prosecute or maintain any suit, action, or proceeding, or file any claim in insolvency relating to such business unless it is done by or on behalf of a company or underwriters holding a licence from a Minister. S. 70 fixes the penalty for violating this clause.

The Chief Justice[2] held that the sections were within the powers of the Dominion Parliament just as it had been held to have jurisdiction in the matter of intoxicating liquors, and he thought that that view was supported by the report of the case *Citizens' Insurance Company* v. *Parsons*.[3] The Parliament of Canada could legislate with respect to matters which affected property and civil rights within the provinces when they had attained such dimensions as to affect the body politic of the Dominion.

Davies J.[4] considered that the clauses were *intra vires*, having regard to the fact that the Act was not applicable to provincial companies carrying on business in the provinces in which they were incorporated. He agreed that the legislation could not be supported as an exercise of the power of legislation as to criminal law or as to the subject of aliens. It was, however, also argued that the legislation was valid under the power to regulate trade and commerce. In no case had it been decided previously what power was granted by this section, but it might well be that the regulation of insurance did fall within this power, but even if this were not the case, it fell within the Dominion Parliament's general power relating to peace, order, and good government, and as the matter was essentially one of national interest and importance such legislation, on the authority of the *Prohibition Case*,[5] would be paramount to provincial legislation.

Idington J.[6] held that the legislation must be *ultra vires* if it did not rest on any exclusive power of the Dominion Parliament, and if it dealt with a matter given to the exclusive authority of the provincial legislatures, unless it could be brought under the residual power of Parliament without trenching on any provincial legislative authority. In his opinion it was impossible to bring insurance under the power to regulate trade and commerce, and any authority to enact it must rest on the residual power of Parliament. In his opinion, resting on that basis it was impossible to uphold the validity of s. 4

[1] 48 S.C.R. 260.
[2] 48 S.C.R. 260, at pp. 261 *et seq.*
[3] 7 App. Cas. 96.
[4] 48 S.C.R. 260 at pp. 266 *et seq.*
[5] [1896] A.C. 348.
[6] 48 S.C.R. 260, at pp 276 *et seq.*

so far as it affected the right of a provincial corporation to do business beyond the limits of the province. He held, therefore, that s. 4 and s. 70 were *ultra vires*, but s. 4 did operate to prevent a foreign company carrying on business in so far as it might be possible to give any operative effect to a clause bearing upon alien foreign companies as well as others within the terms of which was embraced so much that was clearly *ultra vires*.

Duff J. also held that the sections could not be supported under the trade and commerce power, nor, in his opinion, could they be supported under any other power of the Canadian Parliament. *Anglin J.* held also the same view, and *Brodeur J.* was likewise of opinion that both sections were *ultra vires*.

Fishery Rights of the Provinces.—A further important abstract decision affecting the powers of the central and the provincial governments of the Dominion was given by the Judicial Committee of the Privy Council on December 2, 1913.[1]

The Canadian Government, under the authority of the Canadian statute of 1906, put to the Supreme Court of Canada certain questions of a general and abstract character relating to the fishery rights of the Province of British Columbia, and the question was brought before the Judicial Committee on an appeal from the decision of the answers of the Supreme Court. The Judicial Committee pointed out that the practice of asking abstract questions, though its validity had been established by the decision of the Privy Council in a case in 1912,[2] was open to inconvenience, as laying down principles in an abstract form might prejudice the position of future litigants, and it might be practically impossible to define the principles adequately without the ascertainment of the precise facts.

The first of the questions put to the Supreme Court by the Government of Canada related to the powers of the legislature of British Columbia to authorise the Government to grant the exclusive right to fish in any of the waters within the railway belt whether such waters were tidal or, though not tidal, were in fact navigable. The second question raised the same point as to the right to fish below low-water mark in the waters of the open sea within a marine league of the coast of the province. The third question asked was whether there was any difference between the open sea within a marine league of the coast and the gulf, bays, channels, and arms of the sea, and estuaries of the rivers within the province or lying between the province and the United States of America, so far as concerned the authority of the province to confer the exclusive right or any right to fish below low-water mark.

The Judicial Committee pointed out that the railway lands of British

[1] *Attorney-General for British Columbia* v. *Attorney-General for Canada*, [1914] A.C. 153. Reported in the Supreme Court as *In re British Columbia Fisheries*, 47 S.C.R. 493.

[2] *The Attorney-General of Ontario* v. *The Attorney-General of the Dominion*, [1912] A.C. 571.

Columbia were those which the province transferred to the Dominion in furtherance of the construction of the railway from the Pacific coast to the Rocky Mountains, the construction of which was an integral part of the agreement for federation. In the opinion of the Judicial Committee, the grant made in accordance with the agreement was an absolute one, and one which included such rights in and over the waters of the rivers and lakes as would legally flow from the ownership of the soil.[1] In the opinion of the Committee, therefore, the title of the Dominion extended to the soil and the water rights in the Fraser and other rivers and the lakes within the railway belt. In the case, however, of tidal waters, the exclusive title thus vested in the Dominion was subject to the public right of fishing in the sea or creeks and arms of the sea. The origin of this right of the public was not easy to define so far as the high seas were concerned. It was probably recognised by common practice from time immemorial, and extended without challenge in very early times to the foreshore and tidal waters which were continuous with the ocean. It was a right which resembled the right of navigation, and the Crown had probably recognised the duty of protecting their subjects in exercising it, finding that it had been exercised from immemorial antiquity. There were, however, limits or exceptions to the right, but it had been finally laid down[2] since Magna Charta that no new exclusive fishery could be created by Royal grant in tidal water, and that no public right of fishing in such waters, then existing, could be taken away except by competent legislation. The exceptions which were allowed were those in which either the King or some particular subject had gained before Magna Charta a propriety exclusive of this common liberty, but such propriety could not exist in British Columbia, since no rights there existing could date from before Magna Charta. It followed, therefore, that in the case of the railway belt the rights of fishing in the non-tidal waters belonged to the Dominion until they were granted by it to some individual. In the tidal waters, whether on the foreshore or in creeks, the public had a right to fish, and that right, by reason of the provisions of Magna Charta, could not be restrained by any Crown grant alone. The point, however, arose whether a provincial legislature had the power to alter these public rights in the same way as a sovereign legislature, such as that of the United Kingdom, could alter the law. To answer this question it was necessary to consider the limitations of the powers of the provincial legislature under the British North America Act, which reserved to the Parliament of Canada sea coast and inland fisheries. It had been decided by the Judicial Committee in *The Attorney-General for the Dominion* v. *The Attorney-General for the Provinces*,[3] that that power conferred no right of property on the Dominion, but that it did confer on the Dominion an exclusive right of controlling public rights of fisheries, and that the proprietary right of the province was subject to the exclusive power of the

[1] Cf. *Burrard Power Company* v. *The King*, [1911] A.C. 87.

[2] *Malcolmson* v. *O'Dea*, 10 H.L.C. 593.

[3] [1898] A.C. 700.

Dominion to legislate in regard to fisheries, so that the Dominion could control the methods and season of fishing, and impose a tax in the nature of a licence duty as a condition of the right to fish. In the case before them, the right being a public one, the power had been conferred by the British North America Act—as in the case of the power with regard to navigation and shipping—exclusively on the Dominion Parliament, and their answer, therefore, to the first question was that, so far as the waters of the railway belt were tidal, the right of fishing in them was a public right subject to regulation by the Dominion Parliament alone. So far as they were not tidal, they were matters of private property which were vested in the Crown in right of the Dominion. Where the waters were navigable but not tidal, they were the subject of private property according to the law of England.[1]

With regard to the second question, the Judicial Committee decided that the right of fishing in the open sea within territorial limits was a right of the public in general, and could be affected only by Dominion legislation.

Similarly, with regard to the third question—the right of fishing in arms of the sea and estuaries of the rivers—the right to fish was a public right which was subject only to the legislative power of the Parliament of the Dominion.

In the course of the judgment the Judicial Committee declined to express any opinion on the actual position of the Crown with regard to the property in the soil within the limits of territorial waters. They pointed out that these limits were undefined, and that they raised important questions bearing on the interests of foreign countries as well as affecting British subjects, and the Lord Chancellor suggested that it was probable that the questions affecting these interests might have to be disposed of by an International Conference with special regard to the question of fisheries.

Of cases deciding concrete issues three have special importance in their bearing on the limitations of the power of provincial legislatures. In all three cases the Judicial Committee has decided against the validity of exercises of provincial authority which had been held generally in Canada to be within the powers of provincial legislatures, and in both cases the issues concerned have been of importance as affecting the governments of the provinces concerned in a very direct measure.

The Alberta Railway Case.—The Alberta railway case came before the Judicial Committee[2] in January 1913, on appeal from the Supreme Court of Alberta, which had affirmed the judgment in the matter of the single judge of that Court before which the case had in the first instance been heard. The matter had formed the subject of executive consideration in Canada before the question reached the Privy Council. Under the British North

[1] This is an indication that the Committee do not approve the suggestion not seldom made in Canada that a navigable water, though non-tidal, is to be treated as similar to a tidal water.

[2] *Royal Bank of Canada* v. *Rex*, [1913] A.C. 283.

America Act the Governor-General can by Order-in-Council disallow any provincial Act within a year after it has been received from the Lieutenant-Governor of the province by the Secretary of State for the Dominion. An effort was made in the beginning of 1912 to induce the Dominion Government to disallow the Act of Alberta, chap. 9 of 1910, out of which the litigation which reached the Privy Council arose. The position was one of special interest, as any interference with a provincial legislature is always deeply resented in the province, and the Government of the Dominion were placed in the position of deciding, very shortly after entrance upon office, a matter of great delicacy and difficulty which must essentially be regarded as indicating their attitude towards this important part of the machinery of Canadian government. The Dominion Government was asked by those concerned to disallow the Act as being confiscatory and injurious to public credit, as employing borrowed money for purposes different to those for which it had been obtained from the bondholders, whose interests were alleged to be affected by the Act. Counsel were heard by the Canadian Minister of Justice on January 4, 1912, and an elaborate memorandum was submitted by the Premier, Mr. Sifton, on behalf of the provincial government, in which it was claimed that the original contract was not in the public interest, that the company defaulted in payment of interest on bonds which were subsequently paid by the province, and that the Act of the legislature was wholly within its jurisdiction. In a letter also submitted the Premier promised payment of all the sums *bonâ fide* expended in the construction of the railway in question. The Minister of Justice's decision was announced on January 22. Mr. Doherty decided that the Bill should not be disallowed on the ground that he was not convinced, after the very thorough discussion to which the matter was subjected, that it was prejudicial to the credit of the Dominion or not advisable in the interest of the province to take legislative measures to prevent improvident application of these funds. At the same time Mr. Doherty put on record his view of the power and its exercise. As opposed to the view which had in some measure been held by his predecessor that the power was dormant, he asserted that he had no doubt that the power was capable of being constitutionally exercised and might on occasion be properly invoked for the purpose of preventing, not inconsistently with the public interest, irreparable injustice or undue interference with private rights of property through the operation of local statutes *ultra vires* of the legislature. Doubtless, however, the burden of establishing a case for the execution of the power lay upon those who alleged it, and although he could not express any approval of the statute in question, which he felt must be regarded as a most remarkable execution of legislative authority, he was not satisfied that a sufficient case for disallowance had been established, either on behalf of the bondholder, the bank, or the companies, especially considering that the legislation sanctioned by the Assembly evidenced, as it did, a very deliberate and important feature in the policy of the local Government.

The legality of the measure as well as its propriety was argued at length before Mr. Doherty, but he declined to express an opinion on this aspect on the ground that the points argued were for the decision of the Courts. The matter was accordingly brought before the Supreme Court of Alberta, which upheld the contention of the provincial Government, and from that Court it was carried to the Privy Council.

The appeal was brought by the Bank of Canada and by the Alberta and Great Waterways Railway Co. and the Canada West Construction Co. Ltd., against the King and the Provincial Treasurer of Alberta. The main question of dispute was the validity of the statute of Alberta, passed in 1910, chap. 9, dealing with the proceeds of the sale of certain bonds. These proceeds had been deposited with certain banks, one of which was the appellant bank, and the judgment under appeal was given in an action by the Government of Alberta against the two companies to recover the sum of $6,042,083, with interest, being the amount of the deposit held by the appellant bank.

The railway company was incorporated by an Act of Alberta, chap. 46 of 1909, for the purposes of constructing and operating a railway from Edmonton in a north-easterly direction, with a capital of $7,000,000 and power to issue bonds, and the Government of Alberta by another Act (chap. 16) was authorised to guarantee the principal and interest of the bonds to be issued, up to a sum of $20,000 a mile up to 350 miles, with a further amount in respect of the cost of the terminals. The bonds were to be repayable in fifty years, bearing interest at 5 per cent., and it was provided that the bonds so guaranteed were to be secured by mortgage to trustees to cover the railway and its revenues. When the guarantees were signed on behalf of the Government, after the terms had been approved, the province was to be liable for payment of principal and interest, and no person entitled to the bonds was to be under the necessity of inquiry with regard to whether the Act had been complied with. All moneys raised in respect of the bonds were to be paid into a bank or banks approved by the Lieutenant-Governor in Council to the credit of a special account in the name of the Treasurer of the province. The balance was to be credited with interest by the bank, and was to be paid out to the company or its nominee in monthly instalments as the construction of the line proceeded, and the balance of the proceeds of the bonds was to be paid to the company or its nominees after the completion of the railway, while the balance at the credit of the special account, until paid out, was to be deemed part of the mortgaged premises under the mortgage and not public moneys received by the province.

By Orders-in-Council of October 7, 1909, a form of bond was approved. The terms of the single printed bond which was to be issued pending the preparation of engraved bonds provided that it should be secured by a mortgage from the railway company to the Standard Trusts Company, and for the guarantee of principal and interest by the province. The bond was

to be registered in the books of the company in London, and transfers were to be made in these books. Provision was also made that certain banks, including the appellant bank, should be the banks into which the proceeds of the bond were to be paid in accordance with the Guarantee Act.

Arrangements were made after the making of the Orders-in-Council of October 7 with Messrs. Morgan, Grenfell & Co., in London, for the raising of money to be borrowed to enable these transactions to be carried out. The company made a contract on October 28, 1909, with the provincial Government for the construction of at least 350 miles of the line, this contract embodying the conditions as to the application of the proceeds of the bonds and their payment to the company. By a deed of the same date between the company, the provincial Government, and the Standard Trusts Company, the railway company mortgaged its property to the Trusts Company to secure the payment of the bonds for the sum of $7,400,000 and interest at 5 per cent., repayable on January 1, 1959, and the Government guaranteed repayment of principal and interest. Later on, on November 22, the railway company made a contract with the appellant construction company, which, like the Standard Trusts Company, had its head office outside the province, for the construction of the railway, agreeing to pay to the construction company the net proceeds of the bonds issued. Arrangements were then made for the taking up by Messrs. Morgan, Grenfell & Co. of a single bond for $7,400,000, the bonds for smaller amounts to be issued later. As the proceeds of the issue in London came over to New York, the money was paid in instalments in that city, the part with which the appellant bank was concerned being received by its house in New York and credited to the provincial Treasurer. The bank had its head office in Montreal, being incorporated under the Dominion law, and an account was opened at Edmonton, in Alberta, for the purpose of the transaction ; no specie was sent to the branch office, but the proper credit of the special account was arranged for by the general manager ; the whole transaction being carried out on the faith of the arrangement made under the Government guarantee. The construction company commenced the works preliminary to the construction of the line ; the bank made advances, and the company assigned to the bank as security its interest in the proceeds of the bond issue.

Public uneasiness was felt as to the wisdom of the arrangements made by the Government, and a Royal Commission of Inquiry was appointed. A new administration came into office, and two statutes were passed on December 1, Chap. 9 of 1910, after declaring that the railway company had made default of payment of interest on the bonds and the construction of the line, and ratifying the guarantee of the bonds, enacted that the whole of the proceeds of the sale of the bonds and interest, including the $6,000,000 with accrued interest in the appellant bank, should form part of the general revenue fund of the province, and should be paid over to the Treasurer without deduction ; while the second statute (chap. 11) provided that any

person or corporation claiming to have suffered damage through the enactment of the first statute might submit a claim to the Government to be reported on to the Legislature.

A notice was at once served on the bank claiming payment of $6,042,083 with interest, and on the refusal of the bank to pay an action was brought for the sum, the railway company and the construction company being subsequently joined as defendants. This action was successful in the Court of First Instance and the Court of Appeal in the province. It was urged for the bank and for the companies that the first statute was invalid, and the bank also put forward a lien for advances to the construction company. In the Court of First Instance the matter was decided upon the ground that the bonds were within the province, and that the matter was one of a local nature in the province. The Court of Appeal took the same view, holding that the statute was at any rate authorised under the power of the legislature of the province to deal with property and civil rights in the province.

The decisions of these Courts were reversed by the Judicial Committee. In their judgment it was pointed out that the Act purported to appropriate to the province the balance standing at the special account in the banks, and so to change its position under the scheme to carry out which the bondholders had subscribed their money. It was a principle of the English common law that when money had been received by one person, which in justice and equity belonged to another, under circumstances which rendered the receipt of it by the first party a receipt to the use of the other, the other might recover as for money had and received to his use. The principle had been applied to cases where money had been paid to borrowers in consideration of the undertaking of a scheme to be carried into effect subsequent to the payment, which had become abortive. This principle had been applied in the House of Lords in the case of the *National Bolivian Navigation Company* v. *Wilson*.[1] In that case a loan had been raised to make a foreign railway under a prospectus which set out a concession by the foreign Government under which the bondholders were to have the benefit of certain customs duties. The foreign Government revoked the concession, and while it was admitted that the Government had full power to do so, it was held that the bondholders could recover their money from the trustees to whom it had been paid, as the consideration for the advances which they had made had substantially failed. Similarly, in this case, the lenders in London had lent for a definite purpose, and, when the action of the Government altered the conditions, they were entitled to reclaim the money from the head office of the bank at Montreal. Their right was a civil right situated outside the province; no legislation of the province could derogate from that right, and the statute was accordingly beyond the powers of the legislature of Alberta, since what was sought to be enacted was not confined to property and civil rights within the

[1] 5 App. Cas. 176.

province, nor directed merely to matters of a local or of a private nature.

In view of the decision on this ground the Judicial Committee did not consider it necessary to decide the question whether or not the Act was invalid as being an interference with the sole right of the Dominion Parliament to regulate banking, and whether the appropriation of the deposits to the general revenue fund of the province was not outside the powers granted to the province of raising a revenue for provincial purposes.

The decision of the Committee was followed by legislation in the last session of the Alberta Parliament (chap. 6 of 1913) which repeals chap. 9 of the Statutes of 1910, and ratifies and confirms the Acts 9 Ed. VII. chaps. 16 & 46. It authorises the delivery of the bonds in exchange for the interim bond, and annuls defaults of the company up to the coming into force of the Act.

The Question of Death Duties.—On November 11, 1913, a second very important decision with regard to the question of the legislative authority of the provincial legislatures of Canada was given by the Judicial Committee of the Privy Council. The case came before the Privy Council in the form of cross appeals from the Supreme Court of Canada.[1] In the one case the appellants were the executors of Mr. H. H. Cotton, who had died on December 26, 1906, domiciled in Quebec, and in the other case the Crown appealed against a decision in the case arising out of the will of Mrs. Cotton, the wife of Mr. Henry Cotton, who died also domiciled in Quebec on April 11, 1902.

The cross appeal of the Crown was dismissed without discussing the question of the powers of the legislature, but the other appeal was allowed on the ground that the legislation of the province was *ultra vires*.

The decision[2] turned upon the interpretation of the provisions of the Quebec Succession Duties Act of 1906 (chap. 11, s. 1), which provided in a definition section that the term "property" should include all property, whether moveable or immoveable, actually situate or owing within the province, whether the deceased at the time of his death had his domicile within or without the province, or whether the debt was payable within or without the province, and whether the transmission took place within or without the province; and all moveables wherever situated of persons having their domicile or residing in the province of Quebec at the time of their death. The Crown claimed that the presence of the definition extended the operative clause of the Act actually imposing taxation ('55 & 56 Vict. c. 17, s. 1) so as to make it cover all moveable property possessed by the testator, whatever its situation.

The appellants in the first place denied that the definition clause had

[1] *The King* v. *Cotton*, 45 Can. S.C.R. 469, which reversed, as to Mr. Cotton's estate, the decision of the Quebec Court, Q.R. 20 K.B. 164.

[2] *Cotton* v. *Rex*, [1914] A.C. 176.

this effect, but they further contended that if it had the effect the enactment was *ultra vires* of the provincial legislature and was of no validity, on the ground that (*a*) it attempted to tax property outside the province contrary to the decision in *Woodruff* v. *Attorney-General for Ontario*,[1] and (*b*) it was really indirect taxation, and therefore not open to a provincial legislature.

The Judicial Committee decided to deal with both questions even although the decision on the first might render it unnecessary to decide the other, and they pointed out that the latter of the two questions was of the greater practical importance in view of the fact that by a later statute the operative portion of the section had been amended by omitting the qualifying words "in the province," so that a decision depending on the presence of these words would have no application to the existing state of legislation.

The Judicial Committee decided with regard to the first point that the limitation in the operative section to property in the province was not affected by the definition in the defining section. They pointed out that the section containing the definition was necessary for other purposes than the actual imposition of the duty, including the preparation of the declaration required by the Act referring to all the property which passed on transmission, and not merely to that on which taxation was levied; and it therefore held that the appeal must be allowed on this ground alone.

The Judicial Committee, however, also held that the second question must be decided in favour of the appellants. In considering this question it might be assumed that the operative clause specifically extended to the taxation of all the property of the testator as defined in the statute, and the question was whether an enactment in such a form would be within the powers of the provincial legislature by reason of the taxation imposed by it being direct taxation within the province in order to the raising of a revenue for provincial purposes within the meaning of s. 92 of the British North America Act, 1867.

The Judicial Committee pointed out that the Act of 1867 first introduced as a matter of law a distinction between direct and indirect taxation which had, prior to that date, been confined to the treatises on political economy. Numerous cases had been quoted in which the question had been considered by the Judicial Committee; the earliest case occurred in 1884, viz. *The Attorney-General for Quebec* v. *Reed*,[2] where the question involved the validity of an Act of Quebec imposing a duty of 10 cents upon every exhibit filed in Court in any action. The question in dispute was whether the taxation was direct, and the Judicial Committee had applied to this question the definition of Mill in his treatise on political economy[3] that a direct tax was one which was demanded from the very persons who, it was intended or desired, should pay it as opposed to taxes demanded from one person in the expectation that he should indemnify himself at the expense of another.

The Judicial Committee held that a stamp duty payable upon a step

[1] [1908] A.C. 508. [2] 10 App. Cas. 141. [3] Book V. chap. iii.

of a proceeding in the administration of justice was not a direct tax within this definition, and the Act was held to be *ultra vires*.

The question next came before the Board in the year 1887 in the case of the *Bank of Toronto* v. *Lambe*.[1] The Act there called in question was an Act passed in 1882 levying a tax upon every bank carrying on business in the province, the amount of the tax depending upon the paid-up capital and the number of offices or places of business in the Bank. Mill's treatise was again quoted by the counsel for the appellant, and it was also adopted by the Judicial Committee, who held that the taxation was *intra vires* and valid. The question was again raised in 1897 in the case of *The Brewers' and Maltsters' Association of Ontario* v. *The Attorney-General for Ontario*.[2] The question in this case was the validity of an Act requiring brewers and distillers in the province of Ontario to take out licences. Lord Herschell in delivering the opinion of the Board treated the question as being disposed of by the principles in *Lambe's* case, and the Act being valid on the ground that the tax was demanded from the very persons who, the legislature intended or desired, should pay it.

The Judicial Committee considered that this decision had shown definitely the meaning of the term "direct taxation," and that the only question which arose was the application of the definition to the present case. The appellants contended that the Act imposed a succession duty upon all moveable property wherever situated of a testator domiciled in the Province, the duty varying with the amount of the property and the degree of consanguinity of the persons to whom it was transmitted.

The mode of collection of the duty was that every universal legatee, executor, trustee, and administrator or notary before whom a will had been executed was required within a specified time to forward to the collector of provincial revenue a schedule of the estate. The collector then notified the declarant of the amount due, which must be paid within thirty days by him. Thus the collector was entitled to collect the whole of the duties from the man who might be, and in most cases would be, the notary before whom a will was executed, and he must recover the amount so paid from the assets of the estate, or more accurately from the persons interested therein.

To determine whether such a duty came within the definition of direct taxation it was proper to examine ordinary cases which must arise in practice. Take the case of moveables such as bonds or shares in New York left to some person not domiciled in the province: there was no recognised principle of international law that nations should recognise or enforce the fiscal laws of foreign countries, and in such case no doubt the legatee would, on proving the execution of the will, obtain possession of the securities after satisfying the fiscal demands of the laws of New York. The provincial Government could only then obtain payment of the succession duties from some one who was not himself intended to bear the burden but to be recouped by some one

[1] 12 App. Cas. 575. [2] [1897] A.C. 231.

else; such an impost appeared to their lordships plainly to lie outside the definition of direct taxation, and the whole structure of the scheme of these succession duties depended on a system of making one person pay duties which he was not intended to bear but to obtain from other persons. Their lordships were therefore compelled to hold that the taxation was not direct taxation but was *ultra vires* of the provincial legislature.

The decision of the Judicial Committee was very badly received in the province, Acts (chaps. 9-11 of 1914) being at once passed by the legislature with a view to render it clear that the notary was not expected to pay the duties and that the duties were direct taxation on the transmission of the estate to be paid by the beneficiary. The decision of the Judicial Committee, however, in this and in earlier cases,[1] has rendered it extremely doubtful if the provincial legislatures have in any form the power to tax property not actually situated in the province, a position which of course affects the provinces very much in view of the importance of these duties as sources of revenue.

Railway Legislation.—In the third concrete case[2] a decision was given with regard to the powers of the Dominion Parliament in connection with railway matters. The Railway Act of Canada, Chap. 37 of the Revised Statutes of 1906, subjected, by s. 8 (*b*), any provincial railway whatever, though not declared to be a work for the general advantage of Canada, to those of the provisions of the Act which related to through traffic.

An Order, dated May 4, 1909, of the Board of Railway Commissioners for Canada directed, with regard to the through traffic over the Federal Park Railway and the Provincial Street Railway, both within and near the city of Montreal, that the latter should enter into any agreement or agreements that might be necessary to enable the former company to carry out its provisions with respect to the rates charged, so as to prevent any unjust discrimination between any classes of the customers of the federal line.

In the Supreme Court of Canada it was held by a majority that s. 8 (*b*) was *ultra vires* the Dominion Parliament. The majority admitted that a provincial railway might be affected by Dominion legislation necessarily incidental to legislation affecting Dominion railways, as, for example, the passing of regulations touching traffic through the point of intersection of a Dominion and a provincial railway and the surrounding area, but otherwise they considered that legislation regarding through traffic was not necessarily incidental to the exercise of the powers of Parliament respecting a connecting Dominion railway and that there was no reason why the power to legislate

[1] The case of *Woodruff* v. *The Attorney-General for Ontario*, [1908] A.C. 508, was cited for the appellants in the *Cotton* appeal, but the Judicial Committee did not rely on it as the circumstances were special, and there was much doubt as to the reasoning on which it was based ([1914] A.C. 176, at p. 196), a remark which adds to the complexities of the situation.

[2] *City of Montreal* v. *Montreal Street Railway*, [1912] A.C. 333.

wholly with regard to through traffic need be vested in a single authority, divided authority being the principle of the British North America Act. *Davies* and *Anglin JJ.* dissented, being of opinion that legislation regarding through traffic was necessarily incidental to Dominion railway legislation.

The Judicial Committee dismissed the appeal from the decision of the Court below. They pointed out that the effect of the provision in the Canadian Railway Act would seem to subject a provincial railway to the provisions of the Canadian Act dealing not only with the through traffic but with all criminal matters and with the relations of the line and its traffic with navigable waters. This would place the line in the unfortunate position that its local traffic would be subject to the jurisdiction and control of the provincial legislature and the officials of the local Government, and its through traffic, with all those other matters, to the jurisdiction and control of the Dominion legislature and executive—a most unworkable and embarrassing position.

In the opinion of their lordships their decision in a previous case [1] had established that the invasion of the rights of the province which the Railway Act and the Order of the Commissioners necessarily involved in respect of one of the matters enumerated in s. 92, namely, legislation touching local railways, could not be justified on the ground that the Act and the Order concerned the peace, order, and good government of Canada, nor upon the ground that they dealt with the regulation of the trade and commerce; for if the Parliament of Canada had authority to make laws applicable to the whole Dominion in relation to matters which in each province were substantially of local or private interest upon the assumption that these matters also concerned the peace, order, and good government of the Dominion, there was hardly a subject upon which the Dominion might not legislate to the exclusion of provincial legislation. On the other hand, the legislation of the Dominion Parliament in this case could not be justified on the ground that it was necessarily incidental to the exercise by the Parliament of the specific powers conferred upon it in s. 91 of the British North America Act. It was impossible to show that it was necessarily incidental to the exercise of control over the traffic of a federal railway that it should have power to exercise control over the through traffic of a purely provincial railway if it were connected with a federal railway. Even if the provincial companies were not willing to make such agreements with federal railway companies as would enable the latter to discharge their obligations, the provincial legislatures had the power to compel the companies to make such agreements as were reasonably necessary. Moreover, if the matter were of sufficient importance as regards through traffic, the Parliament of Canada could make under sub-s. 10 (*c*) of s. 92 a declaration that the provincial railway was a work for the general advantage of Canada and thereby could obtain a complete and exclusive legislative control over the provincial line. The answer to the argument that the through

[1] *Attorney-General of Ontario* v. *Attorney-General of the Dominion*, [1896] A.C. 348.

traffic could not be controlled by any legislative body if it were not to be controlled by the Dominion was that, so far as it was carried over the through line, it could be controlled by the Parliament of Canada, so far as it was carried over a provincial line it could be controlled by the provincial legislature, and accordingly, in the opinion of the Judicial Committee, the judgment of the Supreme Court of Canada was correct, and the provisions of s. 8 (*b*) of the Railway Act of the Dominion, so far as it subjected to Dominion control a provincial railway in respect of through traffic, was *ultra vires* the Parliament of the Dominion.

While these cases show clearly that the Judicial Committee is fully prepared to maintain its position as the final interpreter of the federal bond, a very recent decision (May 7, 1914) emphasises the limits which the Committee now impose upon their freedom of action in hearing appeals from the Supreme Court of Canada where no principle is involved affecting the Constitution. In the case of *Carey* v. *Roots*, a question of contract regarding the purchase of land, it was attempted to obtain leave to appeal from a decision of the Supreme Court reversing the judgment of the High Court of Alberta in its appellate jurisdiction. The Judicial Committee refused special leave, although it was admitted that precedents could be adduced, the Lord Chancellor laying stress on the fact that it was only by special leave that an appeal could be brought at all, and that it was clearly the intention of the framers of the Supreme Court Act that no appeals should be brought in this, or indeed any class of case, and he intimated that the practice of the Board had in the past been unduly lax.

It is curious that in this case, according to the report,[1] the Lord Chancellor rested the right to grant special leave on the prerogative alone, though in point of fact the prerogative is strengthened, and removed from Canadian control, by the statutory enactment in the Judicial Committee Act, 1844, which is still applicable to all the British oversea possessions, except only the Commonwealth of Australia as regards the High Court itself under the Constitution of the Commonwealth, and the Union of South Africa under the South Africa Act, 1909.

[1] *The Times*, May 8, 1914, p. 3 *b*.

CROSSED CHEQUES IN FOREIGN LAW.

[*Contributed by* W. J. Barnard Byles, Esq.]

Practice of crossing cheques outside the British Empire.—The practice of crossing cheques is notoriously of English origin. The American Negotiable Instruments Law contains no reference whatsoever to the subject, and it is believed that, to all intents and purposes, the practice is unknown in the United States. In some countries, other than those of the British Empire, it has, it is true, received legislative sanction; but, except in two instances, its introduction has been of so meagre and tentative a character as scarcely to justify the assertion that in those countries the principle of the crossed cheque has really been assimilated.

Foreign Examples.—Art. 541 of the Spanish Commercial Code of 1885 constitutes perhaps the earliest example of the recognition of the practice by a foreign country; yet, even apart from the fact that the whole matter is dealt with in one short article, the practice recognised differs materially from that enforced in this country, inasmuch as the cheque may be crossed not only with the name of a banker, in the case of a special crossing, but also with that of a company. This departure from the English principle is undoubtedly to be accounted for by the fact that in Spain, as in many other countries where the employment of cheques has been introduced, the law allows a cheque to be drawn on other persons beside bankers. The next country in order of time to adopt the practice of crossing appears to be the Argentine Republic, as exemplified in the Argentine Commercial Code of October 1889. In this case, at any rate, there can be no question of the subject not having been fully dealt with, for no fewer than fifteen articles (Arts. 819-33) are devoted to the regulation of the crossed cheque. It may indeed be doubted whether any other non-Anglo-Saxon Code has ever so closely modelled itself on English law as in this particular instance; for it would be very nearly true to say that the Argentine Code has adopted in their entirety the provisions of ss. 76 to 82 of the English Bills of Exchange Act of 1882, with the result, for one thing, that the Argentine Republic is the only country, outside the British Empire, where the "not negotiable" crossing is recognised. Moreover, similar provisions to those in ss. 80 and 82 of the English Act, protecting the paying and collecting banker respectively of a crossed cheque, are contained in Arts. 832 and 833; provisions which, it should it be noted, are conspicuous by their absence in the case of other countries which have

adopted the crossing of cheques. Having regard to this thorough-going adoption of English principles, it is almost needless to say that Argentine law does not allow cheques to be drawn on any other person but a banker.

Next in order of time comes the Scandinavian Cheque Law, as it may be termed, since it applies equally to the three Scandinavian countries, viz. to Sweden (March 24, 1898), to Norway (August 3, 1897), and to Denmark (April 23, 1897). Art. 7 of this law recognises the principle of crossed cheques, but cannot be said to deal adequately in any sense with the subject, yet it does at least require, unlike the Spanish, that payment must be made to a banker and to a banker only, even though there is no provision in the law requiring a cheque to be drawn only on a banker. Equally brief and abrupt is the acknowledgment by Japan of the principle as contained in Art. 535 of the Commercial Code of 1899. As far as the order of time is concerned this Japanese provision is really anterior to the Scandinavian example, for Art. 535 of the Code of 1899 is but a slightly more detailed enactment of Art. 821 of the Code of 1890. The new law is more explicit in distinguishing between a general and a special crossing, and, in the case of the latter, permits the collecting banker to appoint another banker to act as his agent for collection. It is otherwise remarkable that Japan should have seen so little reason to amplify her law on the subject. The former Code required a cheque to be drawn only on a banker; there is, however no identical provision in the present Code. The law, from an English point of view, may therefore in this respect be considered to have retrograded, though crossed cheques may be payable to a banker only.

The French Law of 1911.—The most recent and by no means the least important example of the legalisation of the practice of crossing is that afforded by the French law of December 30, 1911. The practice of crossing was sometimes employed previous to the enactment of this law, and consisted in a statement written across the cheque to the effect that it was payable only to a banker or to an *officier ministériel*. It was indeed proposed to legalise this somewhat anomalous practice—as far, at least, as payment to officials was concerned—by the new law, since it was said to be a great convenience to small traders, who might be living far away from a bank, to have their cheques collected for them by officials. The proposal was not, however, accepted, it being objected to (*inter alia*) on the somewhat obvious ground that officials as such have nothing to do with the collection of cheques. Cheques in France, under the law of June 14, 1865, can be drawn on others besides bankers; but, under the new law, only a cheque which is drawn on a banker can be crossed (Art. 8), though a definite statement to the effect that a crossed cheque is payable only to a banker is now not required. Following the English model, on which the law is admittedly founded,[1] a cheque in effect is payable only to a banker if it is crossed (Arts. 8

[1] See *Annuaire de Législation Française* for 1911, p. 169, and notes on the law by M. Ch. Lyon Caen.

and 9) by two parallel lines, whether the words *et compagnie* be inserted between the lines or not. The other provisions of the law are also clearly inspired by ss. 76 to 79 of the Act of 1882, but in two notable respects the English Act has not been followed. Thus the "not negotiable" crossing of s. 81 has not been adopted. It was originally intended to include this form of crossing, but the Senate rejected the idea. Again, no provisions akin to those in ss. 80 and 82 of the English Act, which grant protection to the paying and collecting banker respectively of a crossed cheque, are to be found in this law. The necessity for some such protection was not apparently lost sight of, but it seems to have been considered that, apart from any absolute negligence on his part, the banker would be sufficiently protected according to the general principles of law—a view, presumably, whose correctness time alone can show. English bankers, at any rate, did not at the time of the passing of the Crossed Cheques Act, 1876, of which ss. 76 to 82 of the Act of 1882 are practically a verbatim re-enactment, care to leave their interests in this respect to the possibly not too tender mercies of the common law.

Cheques and Monetary Stringency.—It is undoubtedly the case in France,[1] and probably so in many other continental countries, that the number of persons, especially in country districts, who possess banking accounts is very limited, hence therefore the suggestion that, as already mentioned, a crossed cheque in France should be payable to an official as well as to a banker. No doubt the underlying motive in all cases of the legalisation of the practice of crossing is that of enlarging the number of persons who can be induced to open a banking account so that any possible strain on the monetary currency of the country may, owing to the increased employment of cheques, be proportionately relieved. The existence of a period of monetary stringency is believed to have in fact been the direct cause of the German Government undertaking the legalisation of the whole cheque question, as exemplified in the law of March 11, 1908, since previous to their formal legalisation the user of cheques in Germany was probably too negligible in amount to be of any assistance in times of financial stress.

The Crossing "for Account Only."—The practice of crossing "for account only" (*Para contabilidad; Nur zur Verrechnung*) has been adopted by Art. 823 of the Argentine Commercial Code, by Art. 22 of the Austrian Cheque Law of April 3, 1906, by Art. 14 of the German Cheque Law, and by Art. 11 of the Hungarian Cheque Law of December 28, 1908. *Primâ facie* it might seem that in practice there is little distinction between this and the English form of crossing; but it is further specifically provided, in the Austrian and Hungarian laws at any rate, that a cheque may only so be crossed (and, except in the case of the Argentine Code, no other form of crossing is permitted) where the payee is himself a customer of the bank on which the cheque is drawn, or is a member of the clearing-house of the place

[1] Vide *Journal of Comparative Legislation*, vol. xiii. p. 182.

of payment: in other words, it would seem, is himself a banker. Both in Austria and in Hungary, at least, in the latter case, as far as inland cheques are concerned, cheques can only be drawn on a banker. Though the German law is not so explicit, yet it is admitted that in practice great difficulties arise when a cheque so crossed is made payable to a payee who is not a customer of the drawee bank, and the drawee bank may, it seems, decline to honour such cheques.[1] Thus this form of crossing may be considered as analogous to the English form, for there is nothing to prevent such a form of crossing being employed in this country, but its limited application otherwise sharply distinguishes it.

The Hague Conference and an International Cheque Law.—It is possible that within the not distant future the practice of crossing cheques may be greatly extended, since a draft form of international cheque law has been drawn up for the consideration of the International Conference at the Hague, which has been convened to discuss the possibility of agreeing on the international regulation of bills, notes, and cheques, and Art. 19 of this draft law[2] proposes to introduce the practice as adopted in this country, subject, however, to the right of any State, which is otherwise willing to adopt the law, to decline to allow the practice within its jurisdiction. This proposal bears a marked similarity to the provisions of the French law of 1911, for, like that law, it declines to admit the principle of the "not negotiable" crossing, nor does it contain any provisions akin to ss. 80 and 82 of the Act of 1882. Further, by Art. 20, this draft law adopts the special "for account" crossing.

Notable Omissions from Proposed Law.—The real stumbling-block in the case of the "not negotiable" crossing seems to be the difficulty of selecting a phrase which shall convey to the ordinary mortal unlearned in the law the exact legal significance of the term "not negotiable." Neither the proposed French term *non négociable*, nor the Spanish *no negociable* (as found in the Argentine Commercial Code) help any more than does the English phrase to eradicate the fixed idea that such a crossing means that the cheque is not transferable at all. Possibly the term originally proposed in this country, viz. that of "limited negotiability," might be more elucidative of the matter, but it would seem to pass the wit of man to invent a really terse and self-explanatory term, short of the impossible requirement that a person should write out the definition contained in s. 81 of the Act of 1882 in full. It cannot of course for a moment be suggested that a law which legalises the principle of crossing, but yet ignores the "not negotiable" crossing, would not work perfectly well in practice, since this special form of crossing is, after all, only an addition to the general principle, but as regards the omission from this draft law of any definite protection for the

[1] Cf. *Commercial Laws of the World*, vol. xxv. p. 498.

[2] See the law set out in full, Parliamentary Paper, Commercial No. 1 (1913), Cd. 6680 p. 45.

collecting or paying banker of a crossed cheque the omission seems of far more serious import. If provisions of this character have been considered necessary to protect the interests of bankers in this country, it is difficult to understand why similar safeguards should not be equally necessary in other countries, and bankers as a class may well be chary of leaving their interests to the vague protection of general principles of law, even though, as already mentioned in the case of France, such an uncertain safeguard seems to have been considered sufficient. It can hardly, too, be disputed that the principle of the crossed cheque cannot be brought into actual working without the willing co-operation of the banking community, with the result that, should it be desired really to acclimatise the practice in any country, the bankers must themselves be assured that they run no personal risk in doing their best to attain that end. Again, the omission from the draft law of these safeguards would appear, even if the "not negotiable" crossing be not regarded as indispensable, to render the chance of acceptance by English bankers of this draft law as a possible international cheque law quite hopeless. As it is, the British Empire, as well as the United States, have been unable to agree to the adoption of the so-called "Uniform Regulation" (*Règlement Uniforme*) dealing with bills and notes which has been adopted, provisionally at least, by some thirty-one out of the thirty-eight countries officially represented at the Hague Conference. Still, the practice of crossing has so much to recommend it that it is to be hoped that, however the result be obtained, whether through the instrumentality of a universal cheque law or of separate legislation, its employment will become more general in other countries than has hitherto been the case.

REGISTRATION OF TITLE IN THE FEDERATED MALAY STATES.

[*Contributed by* J. R. Innes, Esq., *Barrister-at-Law, Judicial Commissioner, Federated Malay States.*]

The land system of the Federated Malay States deserves the attention of those interested in the land legislation of the British Dominions, Colonies, and Dependencies, because it furnishes the only instance of the adoption by an Eastern country under British rule of the Australian Torrens system of registration of title almost in its entirety; and its claim to attention is enhanced by the fact that the experiment has been successful.

Land Development.—The circumstances attending the economic growth of the States have been of a kind to put to a severe test the merits of the land policy of the Government. It was not till the year 1891 that this policy received legislative sanction in a scientific and definite form. At that time the land officers of the States had only to concern themselves with the needs of Malay agriculturists, Chinese tin-miners, and a small number of tapioca and coffee planters. Only a few scores of houses were to be seen on each of the sites now occupied by such populous and flourishing towns as Kuala Lumpur, Ipoh, Seremban, and Taiping. Yet the original scheme of land registration formulated by the late Sir William Maxwell has proved suitable to the needs not only of those classes of landowners for which it was first designed, but has provided a satisfactory form of title and an adequate machinery for dealings in land to several new and different classes of proprietors. Thus, the transfer upon sale of one of the very valuable sites upon which a banking or large commercial house in Kuala Lumpur or Ipoh stands is generally as easy and simple a matter as was the sale of a padi field twenty years ago, and the original scheme for effecting transfers and incumbrances of land by means of statutory forms and registration has since been successfully applied to such widely diversified interests as those of the small agriculturist, the tin-miner on a large or small scale, the rich and influential rubber company, and the owner of a valuable building site in a crowded town. A system of land tenure may fairly claim to be successful if, in the country where it obtains, litigation regarding title to land or interests in land is of rare occurrence, and under which most transactions in land may be carried out in a few hours and without recourse to professional assistance. Judged by these standards, the land law of the Federated Malay States, in so far as it concerns security of title and

facilities for dealing in land, must be considered to have been extraordinarily successful. It is proposed in this paper to explain briefly the form of title to land which has been adopted in the States and to describe shortly the scheme of registration of title which is the most conspicuous feature of the whole system.

The Law in Force.—The whole of the law of the Federated Malay States relating to title to, and dealings in, land (not held by special tenure) is now contained in the Land Enactment, 1911, the Registration of Titles Enactment, 1911, and a few sections of the Mining Enactment, 1904. Before 1911 each of the States now included in the Federation possessed its own Land Code. The Land Enactment, 1911, and the Registration of Titles Enactment, 1911, are consolidating enactments passed by the Federal Council and apply to the four States of the Federation. They introduced no new principle into the land law and were evidently intended to effect nothing more than to remedy the inconvenience occasioned by the existence in the four States of separate land laws which were the same in substance but were sometimes expressed in different phraseology. The position in Australia under the Torrens Acts of the different States is somewhat similar, and Australian jurists have called attention to the need for the codification and federalisation of those laws.

Forms of Transfer.—Leaving aside leases which are intended to meet special cases, the two ordinary forms of tenure sanctioned by the Land Enactment are (*a*) the Grant and (*b*) Entry of ownership in the Mukim (parish) Register.

Under the grant the grantee takes the land "to hold for ever subject to the payment thereof of the annual rent of $ and to the provisions and conditions contained in the said Enactment [Land Enactment] and also to the special conditions hereunder written." Reference is made in the grant to the number of the revenue survey plan of the land, as the exact description of land on the official map is an essential part of the machinery of registration of title.

The grant is issued in duplicate; one copy is issued to the grantee of the land and the other copy is bound up in a book called the Register of Titles. Each grant constitutes a separate folium of this book and the Registrar of Titles records therein the particulars of all instruments and dealings required to be registered affecting the land contained in each grant. These entries are called "memorials." Copies of the memorials are also made in the Registration Office upon the copy of the grant held by the grantee and the successive transferees, and these memorials endorsed on the grant give in a summarised form the whole history of the land. The title of a holder of a grant duly endorsed with a memorial of the transfer to him as described above must be taken by all Courts to be conclusive evidence that the person named therein as the proprietor of the land is the absolute and indefeasible owner thereof and his title is not subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party, or on the ground

of adverse possession by another for the prescriptive period (Registration of Titles Enactment, s. 8), but until registered (*i.e.* through a memorial made in the register of the particulars of the instrument carrying out the dealing) no instrument is effectual to pass any land or any interest therein (s. 25). Dealings in land are effected through registered instruments in simple language prescribed by forms in the Registration of Titles Enactment. A Certificate of Title is usually issued in place of a grant when the original grant is surrendered on partition of the land, or it may take the place of the original grant when that instrument of title has been covered with memorials evidencing dealings.

The Mukim Register.—By far the most numerous class of landowners in the Federated Malay States consists of small agriculturists engaged in padi-planting or the cultivation of fruit gardens. The registers of grants which have been described above are kept at a central office in each State, and as many of these small agriculturists live in districts remote from these central offices, and in some cases remote from railways and roads, the centralisation in the registry offices of the whole of the machinery connected with land title would have imposed some hardship on the peasantry of the country. A remedy for this has been found. The Land Enactment (s. 13) provides for the division of the territory of each State into mukims (parishes), and in each of these mukims a local register of land-proprietors is kept. Holders of large areas and of land within townships do not come upon these registers; the title of those who do come upon them is the entry of their names as proprietors in the Mukim Register and is analogous to the title of a copy-holder in England. No formal instrument of title is issued to these proprietors, but they are entitled to receive a document bearing upon it a plan of the land and a copy of the entries in the Mukim Register relating to it; this is styled an "Extract from the Register" (Land Enactment 1911, s. 34). The Land Enactment (s. 35) declares these owners to have "a permanent, transmissible, and transferable right, interest, and occupancy" in the land subject to certain conditions and obligations which do not interfere with the ordinary rights of ownership. The Mukim Register is kept in a very simple form. Transfers and incumbrances (charges) of land are usually executed in the local land office, before the collector and the local headmen, by means of short instruments in plain language, and the whole system constitutes as near an approach as is possible to a record of title to land by a system of book-keeping. Disputes as to title or boundary are of rare occurrence. They come before the local magistrate and collector in the first instance and are seldom carried by way of appeal to a higher tribunal. The success of the land policy of the Federated Malay States in its early stages and up till the present time is largely due to the fact that its originator, the late Sir William Maxwell, who was an experienced land officer as well as a lawyer, and who might appropriately be styled the Torrens of Malaya, realised that an even simpler scheme of registration (the Mukim Register) than a close

adaptation of the Australian Torrens system was suited to the requirements of the small agriculturist of Malaya. Now that improved means of communication throughout the States and a uniform and almost complete land survey have been achieved, it is possible that steps might with advantage be taken to restrict the use of Mukim or Parish Registers and to amplify the scope of the general register—a modification which is already in contemplation.

Similarity to other Systems.—The following are the principal features of the land system of the Federated Malay States which are also to be found in the Torrens Acts of Australia and in some of the Canadian land systems:

(*a*) A warranty by the State of an indefeasible title in favour of a person registered as the owner of any interest in land.

(*b*) Transfer of any registered interest only upon entry on the register in lieu of transfer upon execution of an assurance.

(*c*) The protection of collateral rights derived from registered proprietors, or existing in respect of registered interests by a system of caveats.

(*d*) Creation of mortgages, etc., by means of a charge on land in lieu of a transfer of the proprietor's estate.

Features peculiar to the Malayan System.—The principal features of the Malayan system which are peculiar to it and absent from the Australian systems are:

(*a*) The absence of an assurance fund.

(*b*) The establishment of parish registers, the entries in which constitute the proprietor's title to land as distinguished from an instrument of title, and the provision of forms of transfer, etc., of land upon these registers of an even simpler nature than the forms used for land subject to the ordinary law of registration of title.

(*c*) The judicial sale, under which the sale of charged land by the chargee can only take place under the direction of, and after full investigation by, the Court (this procedure exists in New Zealand and Fiji).

(*d*) A remarkably stringent provision (Registration of Titles Enactment, s. 5) which makes "every attempt to transfer, transmit, mortgage, charge or otherwise deal with land" except in accordance with the Registration of Titles Enactment "null, void, and of no effect."

The need of an assurance fund has not been felt in Malaya, because the land survey has been good and the system of secret conveyancing in force in England has never been allowed to take root in that country.

THE REGISTRATION OF MARRIAGE UNDER MEDIÆVAL ROMAN LAW.[1]

[*Contributed by* J. E. G. de Montmorency, Esq., M.A., LL.B.]

Informal Marriages and their Registration.—The popular idea that the practice of the registration of marriage was introduced by Cardinal Ximenes, the Archbishop of Toledo, in 1497, is not only misleading, but has somewhat obscured our general knowledge of the evolution of certain features relating to marriage, such as parental consent and the existence of the *dot*, that have emerged in the Western modern codes though they have left scanty vestiges in the English law of marriage. The late Roman Empire had a regular and what might be almost called for the free population a universal system of marriage registration. In the present paper it is only proposed to consider some aspects of this question in the area once controlled by the Western Empire, but in order to make the general problem clear it is convenient to refer to certain facts in the Roman law of marriage. From the earliest time there existed under Roman law a species of informal marriage, not to be confounded with *concubium* or *contubernium*, which was distinguished from *justæ nuptiæ* by the fact that it gave rise neither to *manus* nor *potestas*. But *justæ nuptiæ*, with the disappearance of the confarreate and the coemptionate marriages, also grew to be formless, and the distinction between these two formless marriages tended to become blurred. But the distinction was real in essence, for *justæ nuptiæ* possessed a religious sanction, involved certain proprietary rights in relation to *dos*, and produced *potestas*. Mere *matrimonium* involved none of these things. But under the Jus Gentium, *matrimonium* gradually established its position, and after the Emperor Caracalla, about the year A.D. 212, conferred the *connubium* on all the free subjects of the Empire, the formless *matrimonium* based on consent, and at last clothed with a religious sanction, was adopted by all the free subjects of the Empire. But it must be remembered that there still remained a vast unfree and slave population, who now stood in almost exactly the position that the plebeians occupied in respect to marriage before the Servian reforms of 449 B.C. It was not probable that such a population, supplemented by barbarian races outside the empire, would remain content with unions liable to be called, and in fact legally called, concubinary or conterbernious unions. In fact a process similar to that which happened after the Servian reforms took place. The

[1] Being an extract from a study undertaken as holder of the King Edward VII. Research Scholarship awarded by the Honourable Society of the Middle Temple.

ease with which the formless marriage could be dissolved gave rise to two movements: first, an effort clearly to distinguish marriage from concubinage, and secondly, legislation to make divorce public. Both seemed to involve the necessity of publicity of marriage. Now, the informal marriage was not a nullity, even if parental consent was absent,[1] but clearly if there was no consent there was no *dotis dictio* from the parent of the bride. About the year 168 B.C. the practice of dotal settlements arose,[2] and these settlements were actually registered in the Temple of Quirinus. The husband's *donatio ante nuptias*, a species of settlement on the wife introduced between the time of Constantine and Theodosius, extended a system of marriage settlements that was elaborately regulated by Zeno, Justin, and Justinian. The fact that Diocletian and other emperors found it necessary to declare that instruments of settlement were not necessary to the form of marriage[3] shows how rapid the movement towards registration had become. The *Codex Justinianus* (v. 4) laid down the general doctrine that if the father consents the marriage is good, even though no instrument is signed (9, 13), but it goes on to say that in certain cases there must be formal evidence of the marriage, and enacts (23 (7)) that in the case of "unequal" marriages (where concubinage, of course, might be suspected) there must be a dotal instrument, and in fact[4] registration of marriage either by formal dotal instruments or by a declaration "preserved among the sacred archives of the church"[5] became in practice necessary for persons of any position whatever, and absolutely essential for the purpose of legitimising previous issue. This last provision is very significant, and shows how hardly the position pressed upon society. It is proposed to deal in some detail with this question of registration as it evolved in the west under a system of mingled Roman and barbarian law that never came under the influence of the Justinianean reforms.

Ancient Law in Western Europe.—Professor Vinogradoff has recently pointed out the nature of the systems of law that pervaded Western Europe after the dissolution of the Western Empire in the mid-fifth century. He says, quoting the words of Bishop Theodoretos in the middle of that century, that

after having spoken of the unity of government and law achieved by the Empire, he qualifies the statement by the remark that the Ethiopians, Caucasian tribes, and

[1] Paulus Sententiarum, lib. ii. tit. xx. (de Nuptiis) 2 (Haenel, *Lex Romana Visigothorum*, p. 368): Eorum qui in potestate patris sunt, sine voluntate ejus matrimonia jure non contrahuntur: sed contracta non solvuntur: contemplatione enim publicæ utilitatis privatorum commoda præferuntur (see also *Formulæ Sirmondicæ* (xvi.) (Walter, *Corpus Juris Germanici Antiqui*, vol. iii. p. 381).

[2] Muirhead's *Historical Introduction to the Private Law of Rome*, 2nd ed. by Henry Goudy, p. 234 (n. 1).

[3] Pandects, lib. xxiii. tit. 2, xiv., xv.

[4] Novel, lxxiv. cap. iv. par. 2 (Heimbach, *Novellarum Constitutionum Justiniani*, vol. ii. pp. 610-13.

[5] Patrick Colquhoun *Summary of Roman Law*, vol. i. p. 480; see also Muirhead, *ubi sup.* p. 388.

barbarians in general were left to follow their own legal customs with regard to transactions among themselves . . . the principle that a man must be made answerable primarily to his own personal law existed already in germ in the closing centuries of the Western Empire. . . . Three principal statements of barbarised Roman law arose at the close of the fifth and at the beginning of the sixth century: the Edicts of the Ostgothic kings, the Lex Romana Burgundionum, and the Roman law of the Visigoths (Breviarium Alaricianum) compiled in 506 by order of King Alaric II.[1]

The Edicts of the Ostgothic kings were destroyed by and absorbed into the law of the Eastern Empire. The Burgundian Roman code was purely local. But the code of Alaric "became the standard source of Roman Law throughout Western Europe during the first half of the Middle Ages. The Breviarium Alaricianum purposed to be, and indeed was, a more or less complete Code for the usage of the Roman populations of France and Spain."[2] The remarkable men who in the dark sixth century compiled this code based it upon the code of Theodosius II. (A.D. 437), supplemented by the Novels of Theodosius, Valentianus, Martianus, Majorianus, and Severus, the Institutes of Gaius, the private codes of Gregorianus and Hermogenianus, the Sentences of Paulus, and the Opinions of Papinianus, and added to each section of each title an interpretation intended to explain and apply the section to the needs of the peoples using it. Thus we find that, while the whole of the Eastern Empire and all Southern Italy used the code of Justinian and his successors, the Romans of the west adhered to the writings of the jurisconsults and the Theodosian code, and that Alaric II. in his code adapted this phase of Roman law to the needs of the west. The *Breviarium* was in use directly or indirectly from the sixth to the twelfth century[3] throughout the whole of modern France, the Empire of the Franks, and the regions of the Visigoths in Southern France and Spain. It is therefore necessary to turn to the law of marriage as set forth in this and other kindred codes in order to see how far they dealt with the practice of registration of marriage and the giving of publicity to marriage. Professor Vinogradoff touches slightly on this point. He says:

> One of the enactments of the Theodosian Code and of Alaric's Breviarium on lawful marriage, emphasising the importance of the consent of both bride and bridegroom, is stated in such a way that it is possible to catch a glimpse of a wedding ceremony performed before a *judex*, a ruler of some kind, and an assembly of neighbours (vii. 3). It is evident that we are in the presence of a rather debased and Germanised form of legal custom, engrafted on fragments of what had been once a system of Imperial law.[4]

This statement conveys some idea of the importance of the provisions as

[1] *Roman Law in Mediaeval Europe*, pp. 6, 7.
[2] *Ibid.* p. 7.
[3] Haenel, *Lex Romana Visigothorum*, p. xcviii.
[4] Vinogradoff, *Roman Law in Mediæval Europe*, p. 14.

to marriage contained in the *Breviarium*: provisions that are often an improvement on that Roman law of marriage which forms their base.[1]

Roman Law in the Western Codes.—We find, according to Lupi and Savigny, that the population of the area represented by North Italy, Germany, and France was governed, not by a territorial, but by a personal law which, in the case of each person, was the law of the nation to which his father had belonged. There were certain exceptions to this rule: thus (1) all ecclesiastics were subject to Roman law pure and simple, and (2) married women followed the law of their husbands, while (3) children born out of wedlock chose their own law, at any rate among the Lombards. Widows resumed their birth law. The intermarriage of Romans and Goths was absolutely forbidden—an adaptation of the Roman law of Valentinianus, which forbade a Roman provincial citizen to marry a barbarian.[2] The reason that had made it inexpedient for Romans to marry Goths now made it inexpedient for Goths to marry Romans, or any one out of the tribe or nation. The German nations scorned the conquered Romans.[3] Here we see the difficulties of international marriage arising immediately after the downfall of the Roman Empire. The fact is a most important one in its relation to the problems of the present day. The *Lex Romana Visigothorum* dwells on the necessity of publicity in marriage; it allows a marriage to be good and capable of producing legitimate issue if it is publicly contracted by consent in the presence of friends despite the absence of marriage instruments, but publicity is necessary.[4] Though the *Breviarium Alaricianum* provides that a witnessed marriage between persons of equal rank is good even if there is no dotal instrument, yet it declares that every donation must be in writing and must be made in public.[5] Thus almost every marriage received what was practically public registration, since the *dos* or the *arra sponsalitia* was universal. The *donatio ante nuptias* is in the *Breviarium* in the form of a gift to the wife for life with remainder to the children, and, if there were no children, half passed to the wife absolutely and half to the husband's parents if they survived; if they were dead the wife retained the whole of the *arra sponsalitia*.[6]

It is important to observe that before this date there had come into existence, in the west as in the east, once more (as in early Roman times)

[1] The whole question of marriage as treated in the law of the Visigoths is dealt with elaborately by Dr. Max Conrat (Cohn), of the University of Amsterdam, in his very learned work, *Breviarium Alaricianum: Römisches Recht im Fränkischen Reich* (Leipzig, 1903).

[2] See Haenel, *Lex Romana Visigothorum*, p. 92, Codicis Theodosiani lib. iii. tit. xiv.; and Savigny, *Geschichte des Römischen Rechts im Mittelalter*, vol. ii. p. 77 (kap. viii. § 26).

[3] Savigny, *Geschichte des Römischen Rechts im Mittelalter*, kap. iii. § 40 (vol. i. p. 141), and kap. viii. § 26 (vol. ii. p. 77); Conrat, *Die Ehe*, p. 101.

[4] See Haenel, *ubi. sup.* p. 82, Codicis Theodosiani lib. iii. tit. vii.; Conrat, *Die Ehe*, p. 109.

[5] Conrat, *Breviarium Alaricianum*, p. 206. [6] *Ibid.* p. 327.

two classes of marriage—the legitimate and the non-legitimate marriage. The Edictum of Theodoric (A.D. 454–526) in Lex XXXVI. makes this clear: "Si quis ad nuptias non legitimas adspiraverit, legum censuram penitus non evadat: qui nec justum matrimonium, nec filios sciat se habere legitimos."[1] *Matrimonium justum* was, we must believe, a marriage with the registered *dos*, or *donatio ante nuptias* and the necessary consents. We cannot dismiss irregular marriages in terms of *contubernium* and *concubium*, for the irregular or non-legitimate marriage was the one that was destined to survive.

Lex Burgundionum.[2]—The *Lex Burgundionum*, which was promulgated for the use of his subjects of Roman stock by King Gundebald, who died in A.D. 516, and is, therefore, the northern French contemporary of the *Breviarium Alaricianum*, provides (tit. xxiv.[3]) in a title dealing with second and third marriages that the *donatio nuptialis* of all the successive marriages should be the woman's for life, with remainder to the respective children of the different marriages. The *dos* in all "just marriages" seems to have been universal. Tit. xliii. (de Donationibus)[4] shows that all gifts had to be in writing and signed or sealed in the presence of five or seven witnesses of full age. In the same code we see the adoption of the idea of *manus* (which appears to have evolved among the German tribes along independent lines) so long extinct in Roman law. Tit. xiii. (Additamentum Primum)[5] runs as follows: "Quæcunque mulier Burgundia vel Romana voluntate sua ad maritum ambulaverit, jubemus ut maritus ipse (de) facultate ipsius mulieris, sicut in eam habet potestatem, ita et de rebus suis habeat."

Lex Wisigothorum.[6]—When we reach the mid seventh century in Lombardy, we find there in force the *Lex Wisigothorum*, which was in fact a new edition of the *Breviarium* promulgated by King Recceswinth.[7] The third book is entitled *de Ordine Conjugali*. The first title (s. 9) shows us very vividly the process by which the formation of the *Dos* was taken advantage of for the purpose of registration of marriage. The title and its heading are extremely important documents in the history of marriage in the west. The heading is as follows: *ne sine dote conjugium fiat, et ut de quibuscunque rebus dos conscripta fuerit, firmitatem obtineat*, and the text of the title runs:

> Nuptiarum opus in hoc dinoscitur habere dignitatis nobile decus, si dotalium scripturarum hoc evidenter præcesserit munus. Nam ubi dos nec data est nec conscripta, quod testimonium esse poterit, in hoc conjugio dignitatem futuram? Quando nec conjunctionem celebratam publica roborat dignitas, nec dotalium tabularum hanc comitatur honestas. Proinde cum quisquis aut pro se, aut pro filio, aut etiam proximo suo, conjunctionis copulam appetit: aut de rebus propriis, aut de Principum dono conlatis, aut de quibuscunque justis profligationibus

[1] *Corpus Juris Germanici Antiqui*, Ferd. Walter, vol. i. p. 400 (ed. Berlin, 1824).
[2] *Ibid.* p. 299. [3] *Ibid.* p. 316. [4] *Ibid.* p. 323. [5] *Ibid.* p. 347.
[6] *Ibid.* pp. 415-669. [7] Receswindus, *circa* A.D. 649-672.

conquisitis, juxta modum legis datæ conscribendi dotem habeat potestatem. Quodcunque autem legitime in dote conscripserit, modis omnibus plenum robur habebit.[1]

Lex Salica.—The *Lex Salica*[2] gives us a great deal of information about marriage. It again shows us two classes of unions. *Honomo* (*consortium*, or, literally, *household*) was the term used for a lower class of marriage (tit. xiii. 9, Hessels, col. 470). The issue of such marriages were not *legitimi heredes*, but the rules against unions within certain degrees of consanguinity were enforced even in these marriages, which were mostly slave or alien marriages. Tit. xiii. gives us the whole notion of publicity as a necessity of a "just marriage." In a Supplement to the *Lex Salica* known as the Capitulare Ludovici Primi (A.D. 819) we find an interesting link, in the case of the necessary consents to a marriage to a widow, in the history of consents to marriage.[3]

French Capitularies.—Let us now turn to the long series of the French Capitularies beginning in the sixth century.[4] We find various references to the question of publicity. Thus Chapter XV. of the Synodum Veronense (A.D. 755) runs as follows: *Ut nuptiae omnes publice fiant.* XV. Ut omnes homines laici publicas nuptias faciant, tam nobiles, quam ignobiles.[5] Again, the Saxon Capitulary (in Chapter XX.) of the year 789, dealing with prohibited and illicit marriages, imposed different fines according as the offender was noble, free, or bond,[6] thus indicating different classes of marriage. Chapter 33 of 793 (Pepin, King of Italy) imposed penance for illicit marriages within the prohibited degrees, while the following chapter forbade a man to have a wife and a concubine at the same time,[7] thus affording some countenance to concubinage where there was no subsisting marriage: a definite revival of the Roman practice. The mass of Capitulary legislation in the Frankish Empire contains little or no reference to forms of marriage previous to the *Capitulare* of 742 which was issued under the ægis of Pope Zacharias.[8] In this capitulary we find statements as to the marriage law. *Capitulum* 19 allows a filiastra[9] to remarry if she is married against her will; *capitulum* 20 allows the marriage of a free woman and a slave; 21 permits the remarriage of a man if his wife commits adultery with his brother, but 79 forbids re-

[1] *Corpus Juris Germanici Antiqui*, vol. i. p. 470.

[2] See J. H. Hessels' ed. 1880, Dr. H. Kern's notes on the titles, and *Corpus Juris Germanici Antiqui*, vol. i. pp. 1-162. *Conjugium* is referred to in the following titles: xiii. 9, 10; xxv. 6, 9; xliv. 1 (Cod. 10); Capit. viii.; Recap. A. 6; lxx.; lxxi. 1; *Nuptiæ*, xiii. 11, lxxii. 2; *Maritus*, xiii. 6; Sept. c. vi. 7; xv.; Sent. S.S. 5; lxxviii. 4; xcv.; Capit. iv.; xliv. 8, 9; lxii. 1, 2; c.; *Ducere*, lxxiii; *Dos*, lxxii. 1, 2, 3; lxxiii. 1, 2; lxxviii. 4; *Contubernium*, cv.; xlii. 1; xliii. 3; *parental consent* (Capitulare Ludovici Primi [A.D. 819] Cap. iii. viii.; Hessels, col. 419).

[3] Hessels, p. 419.

[4] *Corpus Juris Germanici Antiqui*, vol. ii. [5] *Ibid.* p. 42. [6] *Ibid.* p. 107.

[7] *Ibid.* p. 288. [8] *Ibid.* p. 491.

[9] Apparently a child of doubtful legitimacy; cf. *Matrinia* (see *Ducange* under each of these words).

marriage in any other case; 259 gives special status to a man or woman marrying a fiscalina or fiscalinus (state-serfs), while *Capitulum* 310 penalises incestuous marriages.

When we turn to Book VI. of the *Capitularium Karoli Magni et Ludovici Pii* we have various *capitula* that throw a strong light on the practice as to formalities in marriage in the late sixth and early ninth century in the West. Cap. 133, entitled *de dotibus et publicis nuptiis*, provides as follows: "Nullum sine dote fiat conjugium; nec sine publicis nuptiis quisquam nubere præsumat."[1] The necessity of the *dos* here in effect involves the necessity of a formal marriage document, while the necessity of publicity tends to make the document a public document. We should also notice Cap. 327, which provides[2]: "Ut Christiani ex propinquitate sui sanguinis connubia non ducant, nec sine benedictione sacerdotis nubere audeant" (cf. Caps. 130 and 408).

The provisions of the seventh book are not less important. Cap. 59[3] provides (*de Uxoribus et concubinis*): "Non omnis mulier viro juncta uxor est viri, neque omnis filius heres est patris. Itaque aliud est uxor, aliud concubina. Sic et aliud ancilla, aliud libera. *Et alibi*: Non est dubium eam mulierem non pertinere ad matrimonium, in qua docetur nuptiale non fuisse mysterium." Cap. 60 provides: "Non est conjugii duplicatio quando, ancilla relicta, uxor assumitur, sed profectus est honestatis." Cap. 73 forbids second marriage in the lifetime of the spouses.

But great stress is laid on the distinction between concubinage and marriage, and apparently concubinage was regarded rather as an inferior grade of marriage than as an entirely discreditable union. Marriage and concubinage could not exist simultaneously. But the fact of concubinage made it the more necessary to have formalities that clearly distinguished the one state from the other, and the distinction between the two states was clearly brought out by chapters 60 and 73, the first of which showed that concubinage was terminable at will, the second that marriage is only terminable by death. The matter is further considered in detail in chapter 105,[4] entitled *Quod legitima uxor sit nuptialiter ducenda*. In order to prove a marriage it must be proved that the *nuptiale mysterium* existed. Hence, if a man desires to marry his daughter to a man who has a concubine he can only do so by public nuptials and formal dowry. No blame attaches to a girl who so marries by her father's wish, because hers is marriage and her predecessor's state was concubinage.[5]

[1] *Corpus Juris Germanici Antiqui*, vol. ii. p. 614.

[2] *Ibid.* p. 644. [3] *Ibid.* p. 697. [4] *Ibid.* p. 702.

[5] CV. "Dubium non est eam mulierem non pertinere ad matrimonium, in qua docetur nuptiale non fuisse mysterium. Igitur quicunque filiam suam viro habenti concubinam in matrimonium dederit, non ita accipiendum est quasi eam conjugato dederit, nisi forte illa mulier et ingenua facta, et dotata legitime, publicis nuptiis honestata videatur. Paterno arbitrio viris junctæ carent culpa, si mulieres quæ à viris habebantur in matrimonio non fuerunt, quia aliud est nupta, aliud concubina." (*Ibid.* p. 702.)

Chapter 179 carries the question of formalities in marriage still further. Public nuptials are directed on the ground that secret marriages give rise to moral wrongdoing and physical injury to the offspring. Public inquiry must be made by the priest—the principle of banns—as to the relationship, if any, between the parties: "Et si licita et honesta omnia pariter invenerit, tunc per consilium et benedictionem Sacerdotis, et consultu aliorum bonorum hominum, eam sponsare et legitime dotare debet." Chapter 336 forbids a married man to have a concubine "ne ab uxore eum dilectio separet concubinæ." Chapter 455 appears to provide that the consent of the father to the marriage of his daughter takes the place of and dispenses with the personal consent of the daughter, while in the case of a man personal consent to marriage is necessary. Chapter 463 (*de legitimo conjugio*)[1] gives us important information as to legitimate marriage. It runs as follows:

"Decretum est ut uxor legitime viro conjungatur. Aliter enim legitimum, ut à Patribus accepimus et à Sanctis Apostolis eorumque successoribus traditum invenimus, non fit conjugium, nisi ab his qui super ipsam feminam dominationem habere videntur; et à quibus custoditur, uxor petatur, et à parentibus propinquioribus sponsetur, et legibus dotetur, et suo tempore sacerdotaliter, ut mos est, cum precibus et oblationibus à Sacerdote benedicatur, et à paranymphis, ut consuetudo docet, custodita, et sociata à proximis, quæ tempore congruo petita legibus detur et solemniter accipiatur. Et biduo vel triduo orationibus vacent, et castitatem custodiant; ut boni soboles generentur, et Domino suis in actibus placeant. Taliter enim et Domino placebunt, et filios, non spurios, sed legitimos atque hereditabiles generabunt."

Here we see not only a definite distinction between the public marriage and the secret marriage, but in the last paragraph we have, at least, the suggestion that the formal marriage alone could create certainty as to the legitimacy of issue and the right to inherit.

Formulæ.—If we turn to the various *Formulæ* in use in the early middle ages under Charlemagne and his successors we have information on the subject of marriage forms of considerable interest. The Formulæ of the monk Marculfus[2] (Book ii. cap. 15) gives us the *libellus dotis*, the form in which the dowry was given in writing *ante diem nuptiarium*. Chapter XVI., entitled *si aliquis puellam invitam traxerit*, should be read with the title *Charta* [compositionis] *in puellam facta ab eo qui illam invitam traxerit*[3] contained in the Formulæ Veteres, edited by Jacob Sirmond.[4] These forms show that secret marriages were non-legitimate, and on the man's side involved the death penalty, but that such marriages were capable, if the necessary consents and publicity were secured, and the parish priest sanctioned the arrangement of ratification. All these cases show the great stress laid on legitimate unions

[1] *Corpus Juris Germanici Antiqui*, vol. ii. p. 774.

[2] *Circa* 650 A.D. See also the same title in the Appendix to those Formulæ; *ibid.* vol. iii. pp. 324 and 361.

[3] *Ibid.* vol. iii. pp. 324 and 381, and Formulæ [62] Lindenbrogii, p. 437.

[4] 1559–1651.

in the period of Charlemagne and his successors. The basic fact seems to have been that it was practically impossible to distinguish between secret marriage and concubinage, and that therefore a public formal marriage was necessary to establish the legitimacy and heritable capacity of the offspring. The form of the Salic marriage is of interest. In the Formulæ collected by Jerome Bignon,[1] we have the form of a *Donatio ad sponsam*, which speaks of the marriage "per solidum et denarium secundum Legem Salicam" (compare the *Donatio in sponsa facta* (14) or *Traditio ad sponsam* (15) in Sirmond's collection of Formulæ). Again in the Formulæ Lindenbrogii [2] we find in the *Libellus Dotis* (75) the following phrase: "Igitur dum taliter parentibus nostris utriusque partis complacuit atque convenit ut ego te solido et denario secundum Legem Salicam sponsare deberem, quod ita et feci, similiter complacuit nobis atque convenit ut de rebus proprietatis meæ tibi aliquid in dotis titulum condonare deberem." Another form (78)[3] begins: "Lex et consuetudo exposcit ut quicquid inter sponsum et sponsam de futuris nuptiis fuerit definitum vel largitum, aut ex consensu parentum vel ipsorum, si sui juris sunt, scripturarum solemnitate firmetur." Hence the Libellus Dotis is given *ante diem nuptiarium*.

We may notice in passing that divorce was as formal, and the *libellus repudii* given us by Marculfus (Book II. cap. 30)[4] shows us a formal termination of marriage by mutual consent (cf. the *libellus repudii* (cap. 19) printed by Sirmond).[5]

Lex Saxonum.—The *Lex Saxonum*[6] (A.D. 802, imposed by Charlemagne) in the titles (vi.) *de conjugiis*[7] and the following titles (vii. and viii. *de hæredibus et viduis* and *de dote*) shows us the system of consents to the marriage and of the *dos* coupled with payments to the parents or the tutor (in the case of a widow) or near relatives of the bride. When the consent of the family was not obtained a double fine was paid (tit. vi. 2). The Epitome S. Galli (ninth century) has the following important provision: "qui se in matrimonio conjungunt forsitan nec dotes nec donatio (nem) nec alia scripta inter se non fecerint, licet ipsorum si se ambo voluerint inter parentes aut judices L. bonosvicinos conjunctionem facere; si hoc fecerint talis conjugius stabilis est et filii [os] legitimi [os] habent."[8] In fact, we see the modern continental law slowly shaping itself under the successive influences of the Goths and Visigoths, the Burgundians and Charlemagne, out of the vestiges of the Theodosian law as modified by local customs. And the registration or witnessing of marriage runs side by side with the *dos* and the parental consent. But necessity, especially arising in the

[1] (1589-1656) *Corpus Juris Germanici Antiqui*, vol. iii. p. 401.

[2] Frederick Lindebrog (1573-1647), *ibid.* vol. iii. p. 434. See also *Codex Legum Antiquarum*, Frid. Lindenbrogii (Frankfort, 1613), p. 1255.

[3] *Ibid.* vol. iii. p. 435. [4] Vol. iii. p. 332. [5] Vol. iii. p. 383.

[6] Vol. i. p. 383. [7] *Ibid.* p. 386.

[8] Haenel, *Lex Romana Visigothorum*, p. 83, Codicis Theodosiani lib. iii. tit. vii. (de Nupcias), 3.

numerous cases, dealt with in all the laws,[1] of marriages between free and unfree persons, compelled the recognition of *matrimonium non-justum* in which there was neither parental consent, registration, nor *dos*, but merely *consent*. It is plain enough that what happened in the tenth and eleventh centuries was a repetition of what happened in Rome in the century following the Punic Wars. The distinction (emphasised by King Theodoric, at the end of the fifth century) between *matrimonium justum* and *non-justum* broke down once more. The desire to equalise rights in the whole Empire broke down the distinction in the later days of the Republic, while the desire to equalise rights *in facie ecclesiæ* again broke it down as the Papacy acquired a control as extensive as had been that of the Republic itself. Hence, when the Canon Law at last secured after the time of Gratian complete power in Europe, *matrimonium non-justum*, the mere marriage of consent between the parties, became binding without registration, *dos*, or parental consent. But if the theoretical distinction vanished, and with it the slur of illegitimacy, the practical distinction remained, and remains to this day in the continental law of *dos* and parental consent. Indeed, the modern codes have gone back to the Germanic variations of the Theodosian law, and in theory to-day we see the dignity of *matrimonium justum* reasserted. But in fact the trouble of *matrimonium non-justum* is still at the heart of Europe. In Italy to-day it is said that 6 per cent. of the marriages are marriages blessed by the Church but not registered by the State. Such marriages are certainly not concubinage, but nevertheless the issue are illegitimate. Various modern movements are in reality unconscious efforts once again to give formal status to *matrimonium non-justum*. The system of registration that became general in the fifteenth century was an effort of society to give an exclusive position to *matrimonium justum*. But not even to-day has this effort become successful, and the unregistered marriage in various parts of Europe and the United Kingdom has sufficient recognition to make us realise that the problem which faced the prehistoric Roman still faces us.

[1] Cf. *Lex Angliorum et Werinorum*, tit. x. *de vi* (Walter, vol. i. p. 379); *Lex Frisionum*, tit. vi. *de conjugiis ignoratis*, vol. i. p. 357; *Lex Baiuvariorum*, tit. vi. *de Nuptiis et operationibus inlicitis prohibendis*, and tit. vii. *de uxoribus et causis quæ sæpe contingunt*, vol. i. pp. 261-6; Decrees of Tassilo III., Duke of the Bavarians [772 A.D.], Lex X. vol. i. p. 294; *Lex Salica*, tit. lxx. *de eo qui filiam alienam quæsierit, et se retraxerit* (vol. i. p. 87; Hessels, p. xxxviii. and p. 420).

GRADUATED INCOME TAXES.

[*Contributed by* ERIC H. WILLIAMS, ESQ.]

THE following is a summary of the Introductory Report to a Return of Reports dealing with Graduated Income Taxes in Foreign States.[1] The taxes which form the subject-matter of these reports, though differing greatly both in detail and in general character, possess one main characteristic in common, that of being subjective as opposed to objective taxes. The former take into account the economic circumstances of the persons liable, while the latter consider merely the yield of certain objects of assessment. In the case of the taxes now under consideration the net income of the tax-payer is first ascertained, and then various methods are resorted to for the purpose of adapting burden to capacity. These observations apply, however, only to a limited extent in the case of the income taxes in Italy and Spain. The first step in the process of adapting burden to capacity is the recognition of a limit, regarded as the minimum of subsistence, to the amount of income which is taxable.

Exemption.—In the majority of the systems dealt with in the Reports there is such an exemption limit, though on occasion it is really fixed below the minimum of subsistence. Moreover, the application of the principle of exemption becomes complicated where the income tax does not apply to all sources of income; though even where this is the case some limit is usually found.

The exemption limits in the income taxes of different countries vary widely. The following instances may be given[2]: In the *German States* the limit is £45 in Prussia, Baden, Hamburg, Bremen, and Brunswick, £30 in Bavaria and Lübeck, £25 in Hesse and Wurtemburg, £20 in Saxony and Oldenburg. *Switzerland* is interesting on account of special limits in Bâle, Lucerne, and Neuchâtel. In Bâle single persons are limited to £48, married persons to £60, and widows with young children to £80. In Lucerne individuals are limited to £20 and householders to £32, and in Neuchâtel single persons to £16 and heads of households to £24. Uri

[1] Summary of Reports from His Majesty's Representatives Abroad respecting Graduated Income Taxes in Foreign Countries, with an Introduction by S. Minnis, Esq., of the Inland Revenue Department, who has kindly revised the proofs of this article.

[2] In Austria, under a law of January 23, 1914, the exemption limit has been raised to £66 13s. approximately. In Hamburg it has been raised to £50 by a recent law.

has adopted a limitation of £28, Berne (for earned income) and Thurgau £24, Bâle Campagne and Zürich £20.

The following countries show a great divergency in limitation, for instance: Wisconsin for husband and wife £240, for individuals £160, Greece £160, Norway £56, Spain (for certain classes of persons only) £55, Holland £54, Austria £50, Sweden £44, Hungary £32, Denmark according to locality £33, £39, or £44, and Italy £16.

In several of the above States the income tax does not apply to all income, while in Greece the tax is based on rent rather than real income.

In the case of incomes above the exemption limit the burdens of taxpayers may be adapted to their capacity by three methods:

1. Graduation or progression, based on the amount of the income.
2. Differentiation, based on the nature of the income.
3. Special abatements.

1. **Graduation or Progresssion.**—This is based on the theory that a large income ought to bear a heavier percentage of taxation than a small income. This method is applied in a varying degree to the taxes dealt with, but sooner or later a point is reached when the progression practically ceases, and the tax becomes almost or quite proportional. Progression, like an exemption limit, is somewhat uncertain in its results where the income tax applies only to some sources of income.

The methods of effecting progression illustrated in the systems of taxation described in the reports vary widely, but apart from Italy and Spain they may be grouped into the following four main classes:

(*a*) The abatement system with a uniform percentage rate, but with a certain amount deducted from every income.

(*b*) The system of several categories with varying percentage rates.

(*c*) The tariff system with many categories.

(*d*) The surtax system, under which graduated additions are made to a taxpayer's total direct *taxes*, if these, calculated at uniform percentage rates, exceed a certain amount.

These classes are not, however, mutually exclusive.

(*a*) *The Abatement System.*—Under this method the basal exemption, or a lesser amount, is deducted from every income, the balance only being taxed at a uniform proportional rate. The effect on large incomes is slight, and supplementary methods are frequently adopted. This method is best illustrated by its application in Neuchâtel. There every unmarried taxpayer deducts £16 from his income, every head of a household £24, and a further £8 for every child under eighteen. The rate of the tax is 1·20 per cent. This method is also found in Berne and Obwalden, and in Zürich in a strengthened and in Fribourg in a modified form.

(*b*) *The System of Several Categories with Varying Rates.*—This involves the division of incomes into a number of categories, taxed at percentage rates increasing from category to category. Thus in the Swiss canton of

Uri incomes up to £28 are exempt, and £28 can be deducted from every income exceeding that figure.

	£		£		Per cent.
For incomes between	28	and	40	the rate is	0·25
„ „ „	40	„	80	„ „	0·35
„ „ „	80	„	120	„ „	0·45
„ „ „	120	„	160	„ „	0·60

rising by 0·20 per cent. for each further £40, until, when £400 is passed, the rate is 2 per cent.

Other Swiss cantons which adopt a similar method are Lucerne, Thurgau, St. Gall, Zug, and Bâle Campagne, though in the latter instance there is a difference in outward form. Denmark follows the same system in a more elaborate form.

In Bâle Ville the rate rises from 1 per cent. for incomes not exceeding £160 by a further 1 per cent. for each additional £160 of income, until, for income above £640, the maximum rate of 5 per cent. is reached. The higher rates in this case apply only to the portion of the income which exceeds the upper limit of the next preceding category, not to the whole income as in Uri. Vaud, Ticino, and Grisons adopt this method. Norway also adopts this method in a more complicated form.

In Sweden progression is obtained by an increasing percentage rate on different grades of income below £333; thereafter the nominal rate is a uniform one of 1 per cent., but this is levied on a figure obtained by making graduated percentage additions to the actual amount of the assessment. The maximum percentage addition is 500 per cent., which is applied to the portion of the assessment exceeding £4,444. £5,806 marks the limit of the progression; for assessments above that figure the tax is 1 per cent. on five times the actual assessment.

In the Netherlands (where the income tax applies only to earned income, annuities, etc.), there are separate scales—one where the taxpayer possesses unfunded income only, and another and higher one where he is also assessed to the property tax. This method endeavours to adapt the taxpayer's burden more nearly to his capacity.

(*c*) *The Tariff System.*—This system differs in form and degree rather than in principle from the method last described. It is adopted generally in Germany, and also in Austria and Hungary. Under it there are very numerous categories minimising the increase in the rate of duty on a small increase of income, and carrying on the progression in the rate until a high figure of income is reached, though even here, after a certain point, the rate becomes proportional. All incomes in each step pay the same amount of tax, involving a slight regression within the limits of the step. In some cases, as in Prussia, the tariff is permanently fixed by the income tax law; in others it is varied by the annual budget law.

(*d*) *The Surtax Method of producing Progression.*—Under this method the total amount of property and income tax payable under a simple proportional rate is first arrived at; then if the *total* amount of the *taxes* exceeds a certain figure, progressive percentage additions to the tax are made. Thus in the Swiss canton of Obwalden, if the total tax, calculated at the unit rate of 1 per mille for the property and 0·80 per cent. for the income tax, exceeds 70 fr. but does not exceed 100 fr., 5 per cent. is added; if it exceeds 100 fr. but does not exceed 200 fr., 8 per cent. is added; and so on until for tax exceeding 600 fr., when the maximum addition of 25 per cent. is reached. Aargau, Soleure, and Schaffhausen also adopt this system. It extends to communal taxes also. In the case of Italy and Spain, where the income tax is not a general one, progression is of limited and partial operation only. In Italy the abatement only applies to certain categories of income, and further only to income which is not taxed at the source, but directly assessed on the taxpayer. In Spain the ordinary graduation is restricted to salaries of State and some other officials.

2. **Differentiation.**—Under this heading it is the nature of the income which constitutes the principle according to which the burden of taxation is adjusted. It is an accepted theory that a person whose income is derived from personal labour ought to bear a lighter burder of taxation than a person deriving an income of equal amount from property.

The methods of effecting differentiation between earned or unfunded income, and income from capital may be classified as follows:

(*a*) Differentiation within the income tax itself by means of different rates for different kinds of income.

(*b*) Differentiation by means of a separate general tax on the capital value of property, combined with a general income tax.

(*c*) Differentiation by means of separate taxes on the yield of different sources of income, combined with a general income tax.

(*d*) Differentiation by means of a property tax on the capital value of property, combined with an income tax on unfunded income only, the latter being taxed at a lower rate.

(*e*) Differentiation by means of loading the assessment under a general income tax with a fraction of the value of any property possessed by the taxpayer.

(*a*) *Different Rates of Tax on Incomes of Different Kinds.*—This method is not used by many States.

In Berne income is divided into three classes taxed at different rates. The classes and rates are:

		Per cent.
Class I.	Earned income	3·75
„ II.	Life annuities and pensions . . .	5·00
„ III.	Interest on capital	6·25

This method, which was in use in Luxemburg up to July 1913, is found in a somewhat different form in Italy, where income is divided into five classes.

In Spain widely varying rates exist for different kinds of income, the three main categories being earned income, income from capital, and income which is the joint product of labour and capital.

(*b*) *Differentiation by means of a Supplementary Tax on the Capital Value of Property, combined with a General Income Tax.*—This method is usual in the German States. Thus in Prussia besides the general income tax there is a supplementary tax on capital value applying to all property, movable and immovable, except articles of personal or domestic use. The rate of duty is approximately ·65 per mille, which is roughly equivalent to an additional income tax of 1·6 per cent. on unearned income, assuming a yield on capital of 4 per cent. It is not progressive, though debts may be deducted and there is an exemption limit of £300. This system is also used in Hesse, Baden, Brunswick, Oldenburg, Gotha, and Schaumburg-Lippe.

In Denmark and Norway there are general income taxes combined with general property taxes on capital values.

General property taxes combined with general income taxes are also found in the Swiss cantons of Bâle Ville, Bâle Campagne, Soleure, and Ticino.

In Saxony there is an "Ergänzungssteuer" assessed on the basis of capital value, in addition to a land tax based on yield, but property which is subject to the latter tax is excluded from the operation of the former. The former tax allows deduction of debts, and there is an exemption limit of £600.

(*c*) *Differentiation by means of Separate Taxes on the Yield of Different Sources of Income, combined with a General Income Tax.*—This method is adopted in Bavaria and Wurtemburg.

In Bavaria, in addition to the general income tax, there are the land and house taxes, the business tax, and what may be called the interest and dividend tax.

In Wurtemburg similar taxes exist, but they differ in some respects from the Bavarian taxes.

Austria and Hungary also adopt this system.

(*d*) *Differentiation by means of a Tax on the Capital Value of Property, combined with an Income Tax on Income not derived from Property.*—This is the usual method in Switzerland, and it exists in a highly developed form in Holland. The rates of the property tax and the income tax are fixed so as to produce a differentiation in favour of earned income. Both the property taxes and the income taxes are ordinarily progressive, and charges on the property may be deducted.

(*e*) *The System of "Loaded Assessments."*—This is a new method of effecting differentiation recently introduced in Sweden. Where the taxpayer

possesses property, one-sixtieth of the value of the property is added to his income in order to arrive at the tax assessment on which duty is charged.

The systems described above represent more or less conscious attempts to differentiate between income from property and earned income. In addition, however, many States impose taxes on property, which though they exist solely for revenue purposes and were not imposed specifically with the intention of producing differentiation, do in fact serve to differentiate between income from property and income from personal exertion. Examples are inheritance taxes, land, house, and business taxes, and taxes on transfers of real property. The effect of these taxes may be very important.

3. **Special Abatements.**—Most of the States whose income taxes are dealt with in the Reports grant relief to taxpayers who have a number of children to maintain, and in some cases provision is made for the taxpayer whose economic position is seriously prejudiced by special circumstances, such as prolonged illness.

Some systems give relief in respect of sums paid as life insurance premiums up to a certain amount.

In the German States and in Austria and Sweden the children allowance is restricted to small incomes, while in Denmark, Norway, and generally in Switzerland the relief applies whatever the amount of the taxpayer's income.

As an instance of the application of the principle Prussia may be taken. If the taxpayer's income does not exceed £325, and if he has two children or other dependants, he is placed in the step on the scale of taxation immediately below that to which he belongs on the basis of his income; if he has three dependants he is placed two steps down, and if five or six dependants, three steps down, and thereafter one step for each two additional dependants. If his income exceeds £325 but not £475, a remission of one step may be granted if there are three dependants, two steps if there are four or five, and thereafter one step for every two additional dependants.

The Meaning of "Income" and the Scope of Liability.—The meaning of the term "income" for taxation purposes may vary widely in the systems dealt with in the Reports. It has already been pointed out that many of the taxes are merely taxes on certain forms of income, and do not claim to be general taxes at all. Thus in the majority of the Swiss cantons no general income tax is in force, the income tax applying, speaking broadly, only to incomes other than that derived from property. But even in States where there is a general income tax, the factors determining liability thereto differ widely.

The Subjective Unit of Taxation.—States differ in their conception of the subjective unit of taxation. The household rather than the individual appears as a rule to be taken as the unit, but the adoption of the principle varies somewhat in extent.

Bavaria, Baden, Austria, Denmark, Saxony, and the Netherlands all adopt the principle with variations in its application.

Treatment of Income derived from Abroad by persons resident within the State, and of Income derived from within the State by persons residing abroad.—An important question arises where income from real property or business located in one State accrues to an individual residing in another State. The method of dealing with such income varies in the different States. A special question attached to the general one is that of inter-State taxation in Germany and Switzerland.

The liability of the taxpayer in the State in which he resides, in respect of income from land or business outside the State, will first be referred to.

In Saxony, Wurtemburg, and Baden income from land and business outside the State is excluded from the scope of the income tax. Bâle Ville is a Swiss example of the same system.

In Prussia (with a small exception), Hesse, Hamburg, Bremen, and Denmark a resident is liable in respect of all foreign income.

A number of States make special provision for foreigners resident therein who receive income from abroad. Thus in Austria[1] a foreign resident having income from abroad is relieved from the income tax if it is shown that he has already been subjected to a similar tax in its country of origin. In Prussia and several of the smaller German States foreigners residing there otherwise than for purposes of gain are not liable in respect of land or business abroad.

As regards the treatment in the State of origin of income from land or business arising in one State but accruing to a taxpayer resident in another, under the law in Bremen a person liable in respect of income from land or business in that State, but residing elsewhere, must make a return of his total income from all sources, and it is on this basis that the rate is arrived at, a proportionate abatement being made for the part of the income which is not liable in Bremen.

In a few German States there is a lower exemption limit applicable in the case of persons residing outside, but deriving income from land or business within the State.

In Denmark a flat rate of 3 per cent. instead of the ordinary graduated scale is charged. In Austria persons residing abroad must show that their total income from all sources is less than £50 to claim exemption.

The German Federal Law prohibits taxation for State purposes of the same income in two States of the Federation, the general principle being that localised income should be left to the State where the property or the business premises are situated, while other income is taxed at the residence of the taxpayer. Thus the income from land in Baden owned by a resident in Prussia will be charged in Baden, but not in Prussia. Double taxation is similarly prohibited by the Swiss Constitution.

Companies.—With regard to companies, in some States the company is

[1] The position in Austria in this respect has been somewhat altered by a law of January 23, 1914.

treated as liable to income tax as a legal entity, and the shareholders are also taxed on their dividends, thus involving a double taxation.

In Hamburg, Anhalt, Saxony, Saxe-Altenburg, and Lübeck double taxation exists to the fullest extent as regards ordinary share companies.

In most other German States, including Prussia, Bavaria, Baden, and Wurtemburg, a deduction is made from the profits of the company of a certain percentage on the paid-up capital, and the company is charged only on the balance, the shareholders returning for assessment, and being charged on, the full dividends. Consequently double taxation is involved only to the extent to which the profits of the company exceed the percentage of the paid-up capital which is allowed as a deduction.

In Hesse, the Netherlands, and Norway companies are taxed in full, but the shareholders are not charged income tax on their dividends from such companies.

In Sweden companies are taxed according to a special scale depending on the proportion which the profits bear to the capital, while the shareholders are again taxed on their dividends and on the value of their shares.

In Austria companies are charged under a separate tax, while the shareholders pay the personal income tax on their dividends.

In certain of the Swiss cantons also double taxation exists in one form or another.

As regards the rate of duty for companies, in some States the scale of charge is the same as for individuals, while in others a distinction is made.

Miscellaneous.—As a rule income for purposes of taxation includes income in kind.

There is a considerable diversity as to what may be treated as admissible deductions in arriving at profits. Special provision is sometimes made for agricultural profits. Thus in the Netherlands they are not charged to the income tax, it being assumed they do not exceed 4 per cent. and are accordingly regarded as covered by the property tax.

Various other special provisions exist in other States with regard to liability and exemption from income tax.

Administrative Machinery, Assessment and Collection.—1. *The Assessing Authorities.*—As a rule State officials and local bodies co-operate in carrying out the work of assessment, the latter providing local knowledge as to the circumstances of taxpayers, while the former exercise general supervision. The extent and effectiveness of the State supervision vary widely in different States, and with it, it would probably be correct to say, varies directly the general efficiency of the administration.

The assessment areas ordinarily follow the communal areas, and the communal authority, as such, frequently shares in some form or other the work of assessment, and ordinarily has the power of appointing representatives to the assessment committees.

In Prussia the assessment committee proper has for its sphere of operations the larger local government area of the "Kreis," or group of communes. Its president is a government official, and its members are partly elected by the representative body of the "Kreis," and partly nominated by the departmental government. For each commune within the "Kreis" there is a preliminary assessment committee, presided over by the head of the commune, and composed of members partly elected by the commune and partly nominated by the departmental government. Similar machinery, with the exception of the preliminary assessment committee which is found only in Hesse, exists in the other larger German States. Both in them and in Prussia the communal authority usually has to do the preparatory work of preparing lists of inhabitants.

In the Netherlands there are two committees, the lower one dealing, roughly speaking, with the smaller incomes not derived from property, and the other with all other incomes.

Denmark is divided into taxation districts, each with a tax committee of three members nominated by the Minister of Finance.

These instances must suffice to show the general nature of the machinery which exists for carrying out the work of assessment.

2. *Materials for Assessment, Declarations, etc.*—In most of the States dealt with in the reports, taxpayers are required to make a complete return of income for assessment. This is the case in Germany (except in Saxe-Coburg), in most of the Swiss cantons, Austria, Hungary, the Netherlands, Sweden, Denmark, and Wisconsin. The smallest incomes as a rule need not be declared.

In some States the declaration forms the primary basis of the assessment, and if it is not considered satisfactory, the taxpayer must be given an opportunity of offering an explanation; in others the assessment committee has the right to make an assessment according to its own judgment, if the declaration is not considered reliable.

Usually the taxpayer is expected to give precise figures for each class of income.

Declarations are not required from the taxpayer in the Swiss cantons of Valais, Appenzell, Fribourg, and Glarus. In Norway compulsory declarations were introduced in 1913. In Saxe-Coburg they are optional.

In Italy the required declaration is, it is understood, not strictly enforced in practice, and if the taxpayer does not make a return he is assessed on estimate.

In Spain a declaration is only required of such income as is not taxed by deduction.

Even where the taxpayer's declaration is the basis of assessment, the assessment committees have ordinarily extensive means of checking and supplementing the information furnished, and on the extent to which these means are employed must depend in a large measure the efficiency of the

administration of the tax. The nature of these means varies of course in different States.

3. *Basis of Assessment.*—It may be said that in the majority of cases the income taxes described in the reports are assessed on the basis of a single year's income, either the income expected in the year of assessment or the actual income of the preceding year. There are, however, a number of cases in which the basis is a three years' average, and quantitatively these cases are of great importance, as they include the assessments of companies and large businesses in some of the most important States, including Prussia.

In Germany, apart from the cases of companies and large businesses already referred to, as a general rule fixed incomes are assessed on the income expected in the year of assessment, and fluctuating incomes on the income of the preceding year.

4. *Duty omitted from Assessment and Penalties.*—The powers, conferred by the income tax laws dealt with in the Reports, of enforcing the delivery of returns, and of imposing penalties for furnishing incorrect information, are generally very extensive. A surcharge or fine of varying amount is usually the penalty in the German States. Sometimes the right of appeal is forfeited. This is the case in Denmark, unless the taxpayer has been over-assessed to the extent of more than 25 per cent.

In most of the German States the maximum penalty for making incorrect returns is usually ten times the amount of the duty evaded.

The period for which penalty proceedings may be taken varies considerably. In Denmark it is ten years; in Prussia, Austria, and Baden five; in Bavaria and Saxony three years.

In addition to the penalties, the evaded duty is also recovered, a longer period than that for penalty proceedings being usually allowed.

In Switzerland the provisions relating to penalties for evasion, and to the recovery of tax omitted from assessment, vary considerably.

5. *Assessment and Collection at the Source and Collection Generally.*—In Italy and Spain collection of income tax at the source is a main feature of the administration; while there are traces of the same system in other States, for instance Austria and Baden. Apart from these instances the general principle of the income tax under consideration is that of direct assessment on, and collection of the tax from, the actual recipient of the income.

Where any assessment made on a married man relates in part to the income of his wife, sometimes special provisions are made for the recovery of the duty. This is the case in Prussia, Baden, Wurtemburg, and Hesse.

In Germany the State and local taxes are frequently collected together. In Prussia the whole cost of collection is borne by the communal authorities, whereas in Saxony they receive a percentage for their work. In Wurtemburg if the communes elect to collect the State taxes they receive a proportion not exceeding 2 per cent.

In Denmark a similar consideration is granted to the local authorities.

In Norway the collection in the towns is made by a State official; in the country districts by the village constable.

It is difficult or impossible to obtain reliable figures of the percentage cost of administration, and collection.

In Prussia, Wurtemburg, Baden, and Saxe-Gotha the tax is payable in quarterly instalments; in Bavaria, Saxony, Hamburg, and Denmark, half-yearly.

WHAT WAS IAGO'S CRIME IN LAW?

[*Contributed by* JULIUS HIRSCHFELD, ESQ., LL.D. (Göttingen).]

Shakespeare's "Legal" and "Non-Legal" Plays.—In his book on *Shakespeare, Bacon, Jonson, and Greene* the late Mr. Edward James Castle, drawing the distinction between "legal" and "non-legal" plays of Shakespeare, and, after having shown by a number of instances how in *Othello* inaccuracy of legal terminology and also inexact knowledge of the law in a very great measure prevail, concludes by saying: "I do not think that any lawyer of any real experience prompted or assisted Shakespeare in *Othello*."

Iago's Dramatic Atrocities—and his Legal Crimes.—I believe in order to attempt an adequate discussion of that proposition we must in the first place distinguish between Iago's dramatic atrocities and his legal crimes. Lodovico described the former in these words:

> O Spartan dog
> More fell than anguish, hunger or the sea,
> Look on the tragic loading of this bed,
> This is thy work.

Iago was the intellectual author of the tragedy of Desdemona. That to her kinsman was his great crime. Does it from a legal point of view justify Lodovico in giving this summary order?

> To you, Lord Governor,
> Remains the censure of this hellish villain;
> The time, the place, the torture—O, enforce it!

What was Iago's crime in law?

Professor Kohler, in his book *Criminal Types in Shakespeare's Plays*, gives a very subtle analysis of Iago's fiendish work. He calls the method employed by him "suggestion," which in German has a more pregnant meaning than in English, generally implying something like a hypnotic influence on the mind of another person. He shows the various stages of Iago's progress of "suggestion": the awakening of curious expectation in Othello, the rousing of his imagination, the pretence of pity, mockery, and irony, until the Moor's mind is pitched to such a degree of unreasoning and uncontrollable fury that the additional trick of a *corpus delicti* suffices to make him commit the murderous deed. Yet Iago, having neither suggested nor even contemplated the murder of Desdemona, could not in the eyes of the

law be looked upon as an accessory before the fact. It was only a case of oral defamation, and it would have been difficult indeed to formulate a criminal charge against him on this account. Again, he had persuaded his wife to steal the handkerchief. She did not act on it, but found it and gave it to him. He passed it on. This would hardly constitute criminal theft. Iago had "maimed" Cassio, but nobody knew that it was he who had done it. He had exploited Roderigo, but the only witness to it was dead, and the fraud was not ever mentioned (apart from the letters, which had no processual value, and to which I shall again refer below).

The Murder of Emilia his only "Crime."—The only crime, then, for which an indictment could be drawn against him was, I submit, the murder of his wife. And this deed was in its very nature and execution altogether heterogeneous to his other nefarious actions. What caused Shakespeare to make him commit it?

There is no doubt that the dramatist loved the law and its language. He delights in legal terms, and puts them into the mouth of everybody[1]—here even of poor Desdemona. It is to be assumed that he mixed a good deal with members of the legal profession, and that these talked much shop, probably even more than they do nowadays, as their sphere of interests must have been narrower. Shakespeare was an attentive and retentive listener, and in his plays made use of the terms he had so picked up, but which, owing to the enormous complexity of the old English law, he did not and could not always employ correctly. Nor is it inherently improbable that, in cases where he would not quite trust himself, he was not above talking this or that passage over with one legal friend or another of more or less experience, and more or less versed in a particular branch of the law. Such circumstances might have worked together to lead to the inequality of his phraseology.

Now returning to *Othello*, one is bound to think (with Mr. Castle) that Shakespeare had no legal assistance as regards details and terminology. This, however, would not exclude the assumption that he might have had general advice from a lawyer as to the ultimate development of the play.

Who and what Suggested the Murder of Emilia.—I do not wish to appear too inventive, but I can quite realise the possibility of a situation such as this: Shakespeare's mind was alive with the great psychological and dramatic achievement he had just consummated. Meeting some legal friend he spoke about it and gave him a synopsis of the play. When he had concluded the lawyer asked: "What becomes of Iago?" The poet: "He is led away to be tortured and executed." The lawyer: "On what legal grounds?" The poet: "Is not there enough and to spare for

[1] This fact might have misled some writers into the belief that he himself was a lawyer, which he certainly could not have been. This conjecture is on a par with the other that Shakespeare must have been in Italy, because there are details in his Italian scenes which could only have been known to him from his own observation.

racking the life out of him?" The lawyer: "I don't think so. As far as I can see he has not done anything that would form the basis for an indictment, nor is there evidence on which he could be convicted. You will have to make him perpetrate a felony that can conclusively be proved and so give the law a sure hold upon him." Shakespeare pondered and after a pause: "Then I shall let him kill Emilia. My public must not be left in any manner of doubt that this devil gets what is due to him."

Inconsistency of the Murder of Emilia with Iago's Character.—In order to bring this latter point into proper relief, I must enter into a brief discussion of Iago's character and mind. Of all the villains in Shakespeare, Iago is drawn in the very blackest shades, without a single ray of light and without the faintest trace of a redeeming feature in his composition or action. It is all night with him. Every other of the dramatist's criminals strives consciously and methodically after the realisation of a certain understandable purpose, for the achievement of which he indeed would commit any cruel and villainous deed. Had Iago any ultimate goal in his mind's eye?

Professor Kohler (*Criminal Types*, p. 88) says: "In order to make a fellow like Iago at all endurable the poet was obliged to invest him with so much brain power that he would still exercise a certain degree of attraction. . . . Nor is this supermight of intelligence eclipsed by the gaps which we discover in the evil-doer's chain of designs, and how he has failed to foresee whole points of the development and how he himself is ultimately wrecked on the adequacy of his whole scheme!"

Brandes (*Life of Shakespeare*, p. 610) says: "Iago had no other aim in view but his own advantage."

I am entirely at a loss to understand the view held by either of these eminent writers. Where and how does Iago's "supermight of intelligence" manifest itself? I cannot see how high human intelligence can be discovered where it does not tend consciously and deliberately in the direction of a certain end, shaping its actions accordingly. Devoid of this element it might be foxlike cunningness, but it can never be an intelligence of a higher order, a great human intelligence. And I believe Iago's "intelligence" was of the very lowest order. What was his general design and for what special "advantage" did he work? True, he cheated Roderigo, but this was quite a collateral affair and certainly the most pardonable of his transgressions considering Roderigo's contemptible character. Apart from this mean fraud, however, I cannot detect any special advantage he was working for, nor a design in the means and methods adopted by him.

Professor Kohler (*ibid.* p. 93) says: "People have in modern times found ault with Shakespeare on account of his monologues because they were not always psychologically justified and often only naïve means of an antiquated and undeveloped technique, in order to show something which should have been shown by the action of the play. It has been emphasised

that the monologue was only justified where it corresponded with man's nature in life. This is surely the case, but applies to Shakespeare only in a very limited degree, especially as regards such characters as Iago and Richard III. The monologue here is not "genetic"—meaning (plan) begetting—but reflecting, *i.e.* bringing subconsciousness up to mind's consciousness."

I quite agree with Kohler as to the justification and importance of Shakespeare's monologues, especially where his villains are concerned. Let us, however, see how far the above subtle distinction applies to Iago. In Act I. Sc. 3, we hear him say:

> I hav't—it is engender'd hell and night
> Must bring this monstrous birth to the world's light.

"Engender'd" would clearly mean "genetic"?

> 'Tis here, but yet confus'd
> Knavery's plain face is never seen till us'd.

In this I can find nothing either "genetic" or "reflecting." In Act. II. Sc. 3:

> So will I turn her virtue into pitch,
> And out of her own goodness make the net
> That shall enmesh them all.

This again seems to be "genetic" if anything.

But what is the essence of all these monologues? That he will embroil and wreck them all. But not the slightest thought or hint as to the chances for his own advancement. He will have Cassio "on the hip." Then he goads the Moor on against Desdemona, which logically and necessarily diverts Othello's fury from Cassio to his wife; and so naturally counteracts the criminal though intelligible design of the villain against the lieutenant. He might have hated Cassio, but he could not from any point of view possibly have hated Desdemona. Hatred could not have been his motive. The fact is he was, as Coleridge said, "altogether motiveless." I would add: he had neither hate nor love nor even real desires. He was a creature without emotions of any sort. He was a dead soul. His only instinct was to deal destruction without the remotest thought of what the inevitable consequences would be for himself. In my opinion if ever there was a criminal degenerate it was Iago.[1] It was "all confus'd," and so it remained. He was mentally unable to construct even the loosest plan of destruction. And he could only muddle in and could not muddle out. The only person that it was in his interest to remove was Cassio, and him he "maimed," yet left alive

[1] Shakespeare drew him as such in his monologues as well as in his actions. In modern times a creature like that in the dock would be defended on the ground of hopeless insanity, and, maybe, not without success. Iago was certainly not intended as a refined super-devil. From such a fellow a man like Othello would have shrunk.

to tell his tale. He had not the will-power to concentrate upon the one essential action even when he had decided to do it.[1]

There was, however, one thing in which Iago was absolutely consistent, and in which he showed perfect uniformity of method, and that was that he had worked all his mischief in the dark and from an ambush. And now quite abruptly comes this murderous assault on the wife in open daylight before the Court itself, as it were.[2] The character here fell out of the frame, but dramatic justice was saved.

Legal Aspect of the End of the Play.—Brandes (p. 631) says: "At the end of the play there seems to have been made an interpolation. . . . When the catastrophe had reached its climax there are given some explanations which are entirely superfluous." This refers to the "letters."

I believe that this criticism also bears out my own view that in order to satisfy dramatic justice a "crime" as well as evidence had, presumably at a lawyer's suggestion, to be hastily superadded. The manager may have been waiting for the play.

[1] I have no doubt that Shakespeare meant Iago, like his original, the ensign in Cinthio's book, to be considered also a coward, moral and physical.

[2] They had conveniently left Iago, even after he had "offered" to stab Emilia, in possession of his dagger, which would have been taken from Othello.

REVIEWS.

LETTERS ON WAR AND NEUTRALITY.[1]

EXPERT opinion in the higher branches of known knowledge is, for the most part, accessible only to experts, for the simple reason that it is to be found chiefly in books and treatises written by and for specialists, or for the information of those who study the particular subject. It lies outside the ken of the ordinary layman. If he has to face a difficult question, which requires the expert opinion for the formation of a just judgment, he does not, as a general rule, know where to look for that opinion, and possibly has neither the time nor the opportunity to search for it. Even if he is fortunate enough to be guided to a work of authority upon the class of question which has presented itself to him, he may easily fail to hit upon the principle which ought to govern the particular case. There is no subject, in regard to public affairs, to which such considerations more truly apply than to that of International Law. Seeing that Great Britain is the greatest maritime State, with world-wide interests in politics and in commerce, and connected, not only with foreign nations, but also with numerous colonies and dependencies, by relations of great and still growing complexity and delicacy, one might reasonably have expected that the study of International Law would ere this have grown to a position of prominence amongst the subjects of our higher education. It is, on the contrary, the fact that it has been almost neglected. Stowell, Phillimore, Hall, and Westlake—it would be invidious to designate living experts—are justly honoured as authorities in this important branch of learning. But the study of International Law, either public or (to use the common but not quite accurate term) private, has certainly not reached the same level in this country as it has long attained on the Continent, and especially in Germany. America is at least our equal. The paucity of our recognised experts is an index of the slackness of public interest in the science. And yet truly this is no small or trifling matter. Questions within the sphere of International Law have arisen in recent years which deeply concern our welfare. International arbitration and the creation of an International Prize Court are examples of such questions. Others, such as the position in time of war of mercantile contracts and dealings between

[1] *Letters on War and Neutrality.* By T. E. Holland, K.C. (London, Longmans Green & Co.)

the subjects of belligerent States, loom in the near future. It is obviously important, under any popular system of government, that the electorate should be able in regard to them to form an intelligent opinion. But the average citizen has not been educated in that direction. Should he wish for expert assistance he would not know where or how to look for it. The public, therefore, owes a considerable debt of gratitude to Mr. T. E. Holland, the late Chichele Professor of International Law at Oxford, and last year's Président de l'Institut de Droit International, of which he has been for a very long time a most active member, for the series of Letters upon War and Neutrality which were written by him to *The Times* at various dates between 1881 and 1913, and have since been collected and classified according to their subject-matter by their author in the volume (now in its second edition) whose title is prefixed to this article.

Published from time to time during the period of thirty-two years, these letters have done much to interest and instruct Mr. Holland's fellow-countrymen on occasions of national importance when the intervention of so eminent a jurist was of immediate public utility. The British naval manœuvres of 1888, the Venezuelan trouble in 1902, the Boer War, the Russo-Japanese War, the Hague Convention of 1907, and the Declaration of London have furnished Mr. Holland with appropriate texts for contemporary expositions on "Naval Bombardments," "Reprisals," "Neutrality Proclamations," "Contraband of War," "Aerial Warfare," "The Cutting of Submarine Cables," "An International Prize Court," and other similar topics upon which it was and is the duty of all who care for their country to try to form a sound judgment. Whilst they owe their origin for the most part to passing events, they have a permanent value as contributions to International Law. To these must be added interesting letters on "Martial Law" as it exists in this country. And to lawyer and layman alike there is a great pleasure as well as advantage in the perusal of these letters. They display a wide and accurate learning, as one would take for granted in any published work of Mr. Holland. But their especial and most attractive characteristic—not always to be found in writers on International Law—is the invariable clearness of expression. The reader is never left in doubt as to Mr. Holland's opinion, or, be it added, as to the grounds upon which that opinion is founded. There is an entire absence of the not uncommon fault of confounding the law as it is with the jurist's opinion of the law as it ought to be. If sometimes on a debatable topic the author of these letters expresses his own view so unreservedly as rather to arouse argument, so much the better. Justice thrives on controversy. One may without disrespect think that Mr. Holland in 1907 took a too unfavourable view of the Hague proposals for an International Prize Court, and in 1911 of the Declaration of London. One may differ from him when, in his letter of July 24, 1907, he expresses the view that the abolition of contraband is a suggestion which will not be accepted. One may hold, on the contrary, that

in one event, at any rate, it ought not only to be accepted but insisted upon: that the abolition of contraband is indeed the one essential condition upon which Great Britain might possibly without intolerable risk assent to the immunity of enemy private property at sea in time of war. On these, and possibly on other points, some readers of these letters may form conclusions other than those of their distinguished author. None the less gratefully ought we to recognise the fact that each of them has materially contributed to the formation of a sound popular opinion in regard to the public question of the hour which called it forth, and is at the same time a valuable addition to the store of International Law. None the less heartily ought we to express the hope that such expert knowledge will be placed by Mr. Holland at his countrymen's disposal in the same luminous, timely, and instructive form in years to come, and that others possessed of like learning and acuteness, and endowed with the like power of forcible statement, may follow the example which he has set.

Apart altogether from its direct purpose as a collection of authoritative expositions on important points of International Law, the volume before us possesses an incidental interest. Mr. Holland, without intending it, has presented to us in it some materials for an estimate of the drift of sentiment in the civilised world in regard to peace and war during thirty-three years. Is it a drift towards the settlement of international disputes by peaceful methods, and, if war occurs, towards the mitigation of its horrors, since the time when the French Admiral Aube spoke of "cette monstrueuse association de mots: les droits de la guerre"?[1] On December 11, 1880 (the first year of our survey), Count von Moltke, in reference to the Manual of the Laws of War then recently adopted by the Institut de Droit International, and forwarded to Count von Moltke by Professor Bluntschli, wrote in the remarkable letter which has been translated at length by Mr. Holland at page 25 of this book:

"Perpetual peace is a dream, and it is not even a beautiful dream. War is an element in the order of the world ordained by God. In it the noblest virtues of mankind are developed; courage and the abnegation of self, faithfulness to duty, and the spirit of sacrifice: the soldier gives his life. Without war the world would stagnate, and lose itself in materialism." And, again: "The greatest kindness in war is to bring it to a speedy conclusion. It should be allowable with that view to employ all methods save those which are absolutely objectionable. I can by no means profess agreement with the Declaration of St. Petersburg when it asserts that the weakening of the military forces of the enemy is the only lawful procedure in war. No, you

[1] Somewhat similar language of disrespect towards International Law, appearing in letters written by certain correspondents to *The Times* in 1888, in regard to "Naval Bombardments," elicited from Mr. Holland the rebuke contained in his important letters on that subject which are printed in pages 99-106 of this book. They, with the later letter of April 2, 1904, especially deserve careful perusal.

must attack all the resources of the enemy's Government: its finances, its railways, its stores, and even its prestige." Is this the prevalent feeling to-day?

International wars during the last thirty-three years have certainly not ceased. There has been war between America and Spain, war between ourselves and the Boers, war between Russia and Japan, war between Italy and Turkey, and a war in which Turkey, Servia, Bulgaria, and Greece have been engaged, and which has only just closed. If we turn to the work of creating by international compact rules relating to the conduct of war, for the purpose of mitigating the sufferings of those involved in it and for the purpose also, as between belligerents and neutrals, of limiting its interference with peaceful intercourse, we must sorrowfully admit that much still remains to be done; and indeed, in regard to maritime warfare, most important difficulties still await a final solution.

Nevertheless, so far, at all events, as regards the great countries of Western Europe and the United States of America, if the state of things in 1880 is compared with 1813, one appears to be justified in the conclusion that some progress has been made towards the substitution of peaceful arbitration for the warlike settlement of international differences; and although much remains unsettled in regard to the proper conduct of war by land and sea and the relations during war between belligerents and neutrals; although, further, the probable development of aerial warfare threatens to add a novel and difficult problem; still, the Hague Conventions of 1899 and 1907 and the Declaration of London (whatever be their imperfections), and the agreement for a further Hague Conference in the near future, unquestionably evidence a real and steady desire on the part of the great Powers in recent years and at the present time to co-operate with one another in lessening and limiting the evils of a state of war, and their belief that international agreement will stand the test of war.

Nothing that has occurred proves that the great German warrior was wrong when he wrote that perpetual peace was a dream. Nothing has occurred to justify the most peace-loving nation in abating one jot of her watchfulness or of her powers of self-defence. The lust of territorial aggrandisement and the greed of national predominance have not been banished from the earth, and never will be until (and herein lies the true and only panacea) the moral character of man has been lifted to a higher plane. But enough has happened, small though it be, to encourage all right-minded persons in all countries to work on for the world's peace with quiet, practical endeavour, and as men not without hope.

W. R. KENNEDY.

THE IMPERIAL OTTOMAN PENAL CODE.[1]

Messrs. Bucknill and Utidjian in translating the Ottoman Penal Code appear to be specially qualified to deal with the subject which they have endeavoured to interpret to lawyers unacquainted with the Turkish language, and they seem to have done their work with a remarkable adherence to the original text.

Their Introduction purports to outline the general principles of the Mussulman criminal law as an explanation of some of the characteristic features of the Code, and the regulations that preceded it. More extended inquiry into Mussulman jurisprudence and law would probably have modified some of the conclusions, and perhaps enabled a clearer criticism of the Ottoman legislators' task.

It is true that the germs of the Mussulman law, civil as well as criminal, are contained in the Koran and in the enunciations of the Prophet and some of his prominent disciples. But with the extension of the secular Empire of Islam, from the time of Harun-ar-Rashid until the beginning of the nineteenth century, there has been continuous development in legal conceptions.

Most writers on Mussulman law are aware of the two distinct channels in which its progress has flowed: one is to be studied in the works of text-writers and commentators, the other in the expositions and ordinances of the jurisconsults (*muftis*) who were, from time to time, called upon either to expound the law or to pass decrees in particular cases. This class of expositions began in the time of the great Caliph Harun, whose Chief Justice Abu Yusuf is famous in the annals of Islam as the principal disciple of Abu Hanifa, the founder of the school whose teaching is generally in force in the Ottoman Empire. The *fatwas* delivered by him became the model for most of the future expositions. But between his decrees and ordinances and those delivered in the succeeding centuries by the great number of jurisconsults who flourished both in Turkey and Egypt, the advance in legal conception is as marked as between the enunciations of Coke and Eldon respectively. It may be observed in passing that the archaic idea which had been put forward by some of the legists of Islam regarding the longest period of human gestation was repudiated by two of the principal schools on a dictum of the Caliph Ali, who pronounced ten months as the maximum period. Similarly, the punishment by lapidation for certain offences was abandoned long ago under his declarations, and incarceration was substituted for it. Among the text-writers who might be consulted with advantage in the study of the Ottoman Penal Code are the author of the *Radd-ul-Muhtar*, a work of profound interest to students of comparative jurisprudence; and Ibrahim Halebi (of Aleppo), the author of the *Multeka-ul-Abhar*, which formed the

[1] *The Imperial Ottoman Penal Code.* Translated from the Turkish text by John A. Strachey Bucknill, K.C., and Haig Ahisoghom S. Utidjian. (Humphrey Milford, Oxford University Press.)

basis of d'Ohsson's monumental volumes. These two works, together with the commentary called the *Majmaa-al-Anhar* on the *Multeka*, by a Turkish writer who flourished in Constantinople about the beginning of the nineteenth century, appear to have been, and I imagine still are, the guiding authorities in the Ottoman Empire.

It must not be imagined that the principles laid down in these authorities are unsuited to a progressive society or incompatible with development. Nor are the rules relating to the *zimmis* (non-Moslem subjects) illiberal—they are certainly less illiberal than the anti-Semitic laws in Russia. What they needed was adaptation to modern conditions and needs.

The modern Ottoman legislators in essaying the task of preparing a Penal Code for their country do not seem to have made a careful study of the materials which existed within Mussulman jurisprudence; and in framing the ordinances and rules embodied therein have allowed themselves to be disproportionately influenced by French legal conceptions. Turkish statesmen, politicians, and lawyers owe much to France, but unfortunately they have not always profited by it. Neither the political nor the legal ideas of French writers are suited to an Empire composed of such heterogeneous elements as the Ottoman dominions. Had they shaken off the thraldom in which they had been held so long by French conceptions, they would have found a better model for their legislation in the Indian Penal Code, which was framed so long ago as 1860, and which constitutes by far the most careful and wisest piece of criminal legislation of which there is any record. The Indian Penal Code was the outcome of practical experience in a country where Mussulman law had already been in force for centuries, and where it had been administered for more than half a century by English judges with the assistance of Mussulman *muftis*.

The crudities which mark many of the provisions of the Ottoman Penal Code would thus have been avoided; the classification of offences would have been more systematic and logical; and due proportion would have been observed in dealing with offences in general. For one cannot help noticing that departmental transgressions, which under the English or Indian system would be punished by departmental orders, are dealt with in the Ottoman Penal Code as public offences. Several examples of this kind of mistaken conception appear in the Code; and the Ottoman legislators would be well advised, when dealing next with the general question of penal legislation, to take in hand a more careful classification of public and private offences apart from departmental transgressions.

They have classified offences under three heads—viz. (i) Jinayats, which may be rendered into crimes; (ii) Gunah (pronounced by the Turks as Junah), offences which may be described as misdemeanours; and (iii) Qabahat, an Arabic word which means reprehensible acts. The punishments provided for these different offences are fairly proportionate to their respective degrees. With respect to the culpability of minors, the Ottoman Code appears to

be more lenient than the English law; whilst the punishment provided for the abduction of minors for immoral purposes seems to be wholly disproportionate to the offence. False coining, forgery, and arson all appear to be treated with care and deliberation. The definition of murder might certainly be more scientific.

Now that the Turkish Government have obtained the services of an English lawyer as legal adviser to the Ministry of Justice, it is to be hoped that the task of framing a Criminal Procedure Code will be taken in hand as well as the revision of the substantive Penal Code. On the whole, Messrs. Bucknill and Utidjian are to be congratulated on the production of a valuable and interesting work for which all students of comparative legislation ought to be grateful.

AMEER ALI.

THE MECHANICS OF LAW-MAKING.[1]

SIR COURTENAY ILBERT'S nine lectures on the Mechanics of Law-Making, delivered in 1913 before the Columbia University, have now been revised, and are republished in a handy little volume by the Columbia University Press, New York.

They ought to be read by every one who is interested in the machinery of legislation, or who cares for the form, as opposed to the substance, of our law. As a general rule a lawyer writes a book because he wants to get up a particular subject, and connect his name with it. Having published his book, he is ready to lecture on its contents if he can find an audience willing to listen to him. When President Butler asked Sir C. Ilbert to deliver a course of lectures on the art of statutory drafting he ignored the general rule, and applied to a past master of the craft, who in his turn has freely and lucidly disclosed the mysteries of the art in the practice of which the best years of his life have been passed. In the first lecture Sir C. Ilbert defines the province of the draftsman. The judge and the practising lawyer are concerned only with the law as it is. It is the province of the legislator to determine what the law ought to be, and whether the existing law requires amendment. It is the function of the draftsman to give form and effect to the plans of the legislator. Obviously a statesman may be an excellent legislator but a very incompetent draftsman, just as a man may be an excellent architect but a very poor bricklayer or stonemason. The second lecture describes the various attempts which have been made to reform the English Statute Book, and to reduce its chaotic mass to something like order, and Sir Courtenay pays a tribute to the labours of that unpaid, unthanked, and almost unknown body, the Statute Law Committee. New legislation is always an evil as an infraction of liberty, and can only be justified as being

[1] *The Mechanics of Law-Making.* By Sir Courtenay Ilbert, G.C.B., etc. (Columbia University Press, 1914.)

a lesser evil than leaving the law as it is. But the consolidation of a series of disjointed statutes, or the repeal of obsolete or inconsistent legislation, is pure gain to everybody. The third lecture deals with the comparative study of legislation, and is of special interest to the readers of this Journal. The fourth lecture details the origin and functions of the English Parliamentary Counsel's Office. It describes the internal working of the machinery in the factory where Government Bills are produced. The fifth lecture explains the duties of a Government draftsman, and they are by no means light. A Bill cannot be drafted *in vacuo*. The draftsman must have regard to previous legislation and the rules of common law affecting the subject in hand, and also to the canons of interpretation which will be applied to it, if its construction becomes the subject of litigation or dispute. Often, too, the rules of good drafting must be modified to meet Parliamentary exigencies. Finally the draftsman must be prepared to advise on the effects of amendments moved by irresponsible legislators, and to repair, as well as he can, the damage done in committee. The plight of a well-drafted Bill, when it comes out of a House of Commons committee, usually resembles the plight of a well-dressed woman who has been dragged by an angry mob through a quick-set hedge. The sixth lecture contains a clear and succinct exposition of "rules for the guidance of draftsmen," and points out how largely Bentham has influenced the canons of modern drafting. The seventh lecture deals with the forms of legislation, laying down the just limits of legislation by reference, and giving an interesting review of the uses of delegated powers of legislation. The eighth lecture is devoted to the subject of codification. Sir Courtenay traces the history of the French, German, and Indian codes, and notes that codification has resulted rather from political necessities than from any desire on the part of lawyers or legislators to improve the form of the law. The final lecture is a thoughtful essay on the characteristics of modern legislation. If Sir Courtenay, in defiance of the rules of statutory drafting, has extended his subject-matters beyond the limits of his title, his readers will be none the less grateful to him for an interesting review of the theory as well as the practice of law-making, and for suggestive excursions into the history and philosophy of legislation.

M. D. CHALMERS.

THE CORONATION DURBAR AND ITS CONSEQUENCES.[1]

As its full title indicates, this pamphlet of ninety-two pages must be read with the author's standard work on *The Government of India* (second edition, 1907). His first Supplementary Chapter explained, and incorporated in

[1] *The Coronation Durbar and its Consequences.* A second Supplementary Chapter to *The Government of India.* By Sir Courtenay Ilbert, G.C.B., K.C.S.I. (Oxford: Clarendon Press, 1913. 2*s.* 6*d.* net.)

that main work, the important changes resulting from the Indian Councils Act of 1909; that Act altered the constitution and functions of the Indian Legislative Councils, and gave power to make changes in the executive Governments of the Indian Provinces. This second Supplementary Chapter to the same standard work continues the processes of exhibiting what may be termed comprehensively the constitutional law of India brought up to date, and of incorporating the changes in the main work. There is a noteworthy difference between the two Chapters. The changes dealt with in the first Chapter resulted directly from the Statute of 1909; those treated in this, the second, Chapter originated from the announcements made by His Majesty the King-Emperor at the Coronation Durbar at Delhi on December 12, 1911. To legalise what His Majesty was "pleased to announce" certain Proclamations, Notifications, and a Declaration under existing Statutes and Indian Acts were issued; and in 1912 a new Act of the Indian Legislature (regarding the application of the laws in force in the re-arranged Provinces of India) and a brief Statute (for various purposes) were required and passed. The author's object, therefore, in this second Chapter is to bring together and show the legal requirements necessitated by His Majesty's announcements, which he terms the consequences of the Coronation Durbar.

The announcements at the Durbar consisted of (*a*) the King's personal feelings, (*b*) the declaration of certain grants, concessions, reliefs, and benefactions—to these no further reference is here required—and (*c*) certain territorial changes decided upon. These latter were, briefly, (1) the transfer of the seat of Government from Calcutta to Delhi, (2) the creation of a Governorship for a remodelled Bengal, (3) the creation of a Lieutenant-Governorship (with a Council) of Behar, Chota Nagpur, and Orissa, (4) the reconstitution of a Chief Commissionership of Assam. A redistribution of boundaries was involved in each case.

The intention of making Delhi the future capital of India was the keystone of all these territorial changes. This is not the occasion to discuss the policy of the original partition of Bengal, which did not receive universal approval. It is sufficient to mention that, in consequence of the Durbar announcements, the Province of Eastern Bengal and Assam (formed at that original partition) was abolished; a large area of the Lieutenant-Governorship of Bengal was transferred to the new Lieutenant-Governorship of Behar and Orissa; a Governor, instead of a Lieutenant-Governor, was appointed for the remaining divisions of Bengal; and the old (since 1874) Chief Commissionership of Assam (absorbed into the Eastern Bengal and Assam Lieutenant-Governorship at the original partition) was revived. Sir Courtenay Ilbert has shown in detail how this redistribution of territories was legally carried out. In appendices he has reprinted the official despatches which led up to them, and has given the notifications, etc., and legislation which carried out the announcements indicated. In another appendix he has reproduced from a

Parliamentary Paper of 1913 the "Revised Regulations for Constitution of Legislative Councils," and finally, he has twenty-five pages of *Addenda* and *Corrigenda* which these changes (above outlined) involve in his main work and in the first Supplementary Chapter. This laborious operation required knowledge and minute accuracy which no one possesses more fully than the author. A new consolidating edition of his main work would have made things easier for a lawyer or the general reader. But it is believed that a general Consolidating Statute of the Constitutional Law relating to India is in preparation, besides further changes at the India Office foreshadowed by the Secretary of State, so that a new edition of the main work would soon have required further emendation. When something like finality is possible, it is to be hoped that Sir Courtenay Ilbert will see his way to compile a consolidated edition. He has made *The Government of India* his peculiar province, and no partition or redistribution of his territories can improve upon his treatment thereof.

C. E. Buckland.

THE BENGAL CODE, 1913.[1]

Accessibility has always been one of the principal characteristics of Indian law: an important point anywhere, but especially so in a country subject to a foreign Government. Apart from the official publication of each Act and Regulation, as passed, in the Government Gazettes, there have been from the earliest days of Indian legislation collections of the Regulations and Acts issued and re-issued in volumes; and various editors have from time to time produced copies of the Acts, etc., arranged in such methods as pleased them —in digests, analyses, etc. For many years past the Legislative Departments, Imperial and Provincial, have issued editions of the Regulations, and of the Acts affecting the whole of India or the separate Provinces. The whole series occupies considerable space in a Law Library; and, as years go by, fresh enactments, and especially Repealing Acts, render any edition of the laws incomplete, if not superseded or obsolete.

The time had, therefore, apparently come for this, the fourth edition of the Bengal Code, which has been brought out by Mr. F. G. Wigley, C.I.E., formerly Secretary to the Bengal Legislative Council, with the assistance of two Indian gentlemen, officially connected with him in Bengal legislation. This work, therefore, though not stated to be "published by authority," has all the authority attaching to it which can be guaranteed by official parentage, personal knowledge and experience, and the *imprimatur* of a scientific draftsman. An inquirer into the law of Bengal must not expect to find in

[1] *The Bengal Code:* in four volumes: containing the Regulations, Ordinance, and Local Acts in force in the Presidency of Fort William in Bengal. Fourth Edition, edited by F. G. Wigley, C.I.E., of the Inner Temple, Barrister-at-Law. (Calcutta: The Bengal Secretariat Book Depôt, 1913.)

this volume more than it claims to contain. For instance, it makes no mention of the machinery for Indian legislation which has developed, from the time when the Regulating Act of 1773 empowered the Governor-General of India and his Council to make Rules, Ordinances, and Regulations, to the latest changes made in 1912 in the Regulations relating to the Legislative Councils in India. In short, this volume presumes the existence and powers of the legislative machinery and deals only with the results. Moreover, it does not profess to comprise the General Acts of the Council of the Governor-General, or any of the Acts in force in the Provinces of India other than Bengal (that is, the territories comprised within the Presidency of Fort William in Bengal). It is emphatically the first volume of the Bengal Code, containing, so far as they are in force, the old Bengal Regulations from 1793 to 1833, and, subsequently, the Acts of the Governor-General which apply to Bengal, the Regulations made under a Statute of 1870, and an Ordinance made under a Statute of 1861. It contains also four general Acts, for the special reason that they have not been published or not fully reproduced in the last edition of the General Acts. The succeeding volumes II. to IV. are to contain the remainder of the local enactments in force in Bengal, with various tables and notes to complete the information available regarding the Code. Certain enactments have been omitted because they are of a purely private character, or are spent or obsolete.

This Code, therefore, exhibits the statutory laws that apply to Bengal only, and not to other Provinces of India. Other volumes, not of this Code, contain the General Acts and Acts of Parliament (not reproduced in this Code) which apply to Bengal as well as to other parts of India. Any one, therefore, who seeks to know the law in force *in Bengal only* will find it clearly set out in this Volume I. and the others which are to follow.

To understand this volume the reader must acquaint himself with the Preface, in which the main changes made in reprinting the enactments are systematically explained. It is evident that the work of the editor has not been merely mechanical or clerical. The intimation that the material has been treated in certain ways in *some* cases implies that the editor has used his discretion in dealing with it: and certain footnotes, he states, which do not cite any authority should be understood as expressing only his personal opinion. The notes and cross-references must have involved immense labour; their absolute accuracy may be presumed, but can only be tested by use in practice. It is evident that the amending and repealing Acts of 1897 and 1903, with their voluminous schedules, have done much to clear away dead matter and introduce alterations.

The change from the verbose style of the early Regulations to the briefer sentences of the modern Acts is very noticeable. The lengthy preambles of pre-scientific days are now relegated to the "Objects and Reasons" which precede projects of law, but do not reappear when the Bills are passed into Acts. The contents of these preambles would furnish

matter for a historian of economic and political progress. It is often falsely alleged, in spite of authentic information, that famines are now caused by the policy of Government. The preamble to an early Regulation of 1793 contains the following words: "The extensive failure or destruction of the crops that occasionally arises from drought or inundation is in consequence invariably followed by famine, the ravages of which are felt chiefly by the cultivators of the soil and the manufacturers, from whose labours the country derives both its subsistence and wealth." The subjects of the enactments cover a wide range, from the Permanent Settlement of the Land Revenue, Police, Suttee, to many smaller matters. The necessity for a legal basis for everything appears to have been always recognised. The Government might have been permitted, one would have thought, to determine its districts by executive order; but an Act was passed in 1836 to make it lawful for the Government to create new *zilas* (districts) in any part of Bengal. That Act might be used now with advantage to subdivide some of the heaviest charges in the Presidency. Presuming that the remaining volumes will come up to the standard of this first one, this edition of the Code will be invaluable to every one concerned with the administration of the law in Bengal, and is a credit to Mr. Wigley and his assistants.

C. E. Buckland.

THE LAWS OF CEYLON.[1]

A second edition of Mr. Justice Pereira's standard work will be welcomed by all students of Roman-Dutch law. It appeared originally in two volumes. The first, published in 1901, bore the title of *Institutes*, adopted from the treatise of Mr. Justice Thomson, which Mr. Justice Pereira had at one time intended to edit but which had become too antiquated to admit of that process, and consisted mainly of a commentary on the Civil Procedure Code, 1889 (Ordinance No. 2 of 1889). In the second volume, published in 1904, the title *Laws of Ceylon* was substituted for that of *Institutes*. It contained a systematic exposition of substantive Roman-Dutch law in general and in its application to Ceylon, as well as of so much of the legislation of the Colony as was relevant in a treatise on substantive law. The present edition consists of one volume only. The commentary on the Civil Procedure Code has been omitted for two reasons. "It has been thought," says the learned author, "that such a commentary would, strictly speaking, be outside the scope of a work intended to be an exposition of the substantive law of the country; and, secondly, the present Code of Civil Procedure is soon to be superseded by a new enactment."

The enactment here referred to is a draft Code of Civil Procedure, on the

[1] *The Laws of Ceylon.* By Mr. Justice Walter Pereira. 2nd edition. (Colombo H. C. Cottle, Government Printer, Ceylon.)

lines of the English Judicature Acts and Rules of Court, prepared by a local committee appointed by Sir Henry McCallum during his administration, and now in the hands of the Government of Ceylon. Mr. Justice Pereira has, however, in his new edition, reproduced the historical sketch of Roman-Dutch law and of the juridical system of Ceylon which formed so valuable a part of the *Institutes*, and has brought his statement of the substantive law thoroughly up to date, due allowance being made for inevitable delay in passing the work through the press. The second edition of *The Laws of Ceylon* will fully sustain the reputation of the first. When a third edition is called for, Mr. Justice Pereira might perhaps consider whether even the substantive law of Ceylon does not afford material for two volumes. No useful purpose, of course, would be served by a treatment at large of those branches of the law of the Colony which are of purely English origin, and it would be equally hopeless to seek to incorporate into a text-book on the law of Ceylon as a whole the substance—to take a single instance only—of Mr. Modder's excellent treatise on Kandyan law. But it might be possible to state briefly the rules of the several special bodies of law that co-exist in Ceylon with the Roman-Dutch and the English, in regard to the principal subjects with which the work deals.

The Kandyan law as to donations, the customs of the Malabar inhabitants of the province of Jaffna—known as the Thesawalamai, and now incorporated to some extent in the Jaffna Matrimonial Rights and Inheritance Ordinance, 1911 (No. 1 of 1911)—and the Muhammadan Code of 1806, applicable originally only to the Moors in the province of Colombo, but extended later on to Muhammadans in other parts of the island, raise problems of frequent occurrence on the solution of which a treatise on the Laws of Ceylon might well throw light. Mr. Justice Pereira's book itself furnishes evidence, which every one acquainted with the administration of justice in Ceylon could readily multiply, of the variety of questions with which the Courts have to grapple. Laurent doubted whether the system of magisterial correction embodied in the Code Civil had not in France withdrawn from parents the power of inflicting moderate domestic chastisement upon their children, and we know now that in England, in spite of *dicta* apparently to the contrary, the common law has never really recognised the right of a husband to punish his wife. But the latter right, with statutory safeguards, is expressly embodied in the Ceylon Muhammadan Code of 1806, and it is said to have existed in the common law of the Dutch Republic. Is it part of the common law of Ceylon? Does a woman, otherwise a minor, attain majority on marriage, or is she only emancipated from parental, to be subjected to marital, control? How far has the English law of trusts eaten into the Roman-Dutch law of *fidei commissa*? Does the law of Ceylon recognise actions for specific performance? Has *restitutio in integram* survived the enactment of the Civil Procedure Code? Has a lessee the right to claim compensation for improvements —*impensæ utiles*—effected without the consent of his lessor? Had the subject

the right, under Roman-Dutch law, to sue the sovereign in tort, and, if so, has it passed to the subject under British rule?

These, and innumerable other questions equally dissimilar in character and importance, have occupied in recent years the attention of the Courts of law, and their number and variety show no signs of diminishing. "This difference in our law," says Mr. Justice Pereira, "is greatly to be deplored. It is the cause of much uncertainty in matters concerning civil rights, and hence of a great deal of the litigation and crime among, at any rate, the less advanced classes." The "half-divine humourist of antiquity" described his countrymen as, perched upon points of law, they chirped over their suits all their life long.[1] As a corrective to the same tendency in Ceylon, Mr. Justice Pereira suggests codification. The recent publication of the first volume of Sir Ponnampalam Arunachalam's *Digest of the Civil Law of Ceylon* is an interesting departure in this direction. The task would be one of great difficulty. But who can tell what the future may have in store for the Laws of Ceylon?

A. W. R.

COLONIAL AND FOREIGN LAW.[2]

THE monumental revision of *Burge's Colonial and Foreign Law* under the accurate and skilful editorship of Mr. Justice Wood Renton and Mr. George Grenville Phillimore is now well advanced. With the appearance of the fourth volume of the work, commencing as it does with an account of the law of guardianship, the subject of Personal Law comes to an end. Whether the learned editors are right or otherwise in identifying "personal laws" with laws which (by concession or compulsion) have extra-territorial effect, it is true that a well-marked separation exists between what may roughly be styled Family Law on the one hand and Individual Law on the other. It is a division more of art than of science: and the status of the alien and the slave has an inveterate, if an illogical, connection with the first-named division. True, the status of aliens and slaves could be logically united in treatment with that of the status of minors and wives. But Family Law includes very much more than the law of family status: it includes the rights of family members *inter se*. It not only shows the modifications which family inferiority introduces into the normal law, but it also, and principally, exhibits the normal law of family relationship. Nevertheless, logical or not, the segregation of these topics, which centre round the peculiarities of individual *milieu*, has for two thousand years at least dominated judicial categories.

It is characteristic of the editors' conception (closely resembling Savigny's) of "personal law" as substantially family law that the subject of lunacy and

[1] *οἱ μὲν γὰρ οὖν τέττιγες ἕνα μῆν' ἢ δύο ἐπὶ τῶν κραδῶν ἄδουσ', Ἀθηναῖοι δ' ἀεὶ ἐπὶ τῶν δικῶν ἄδουσι πᾶντα τὸν βίον.*—Ar. *Av.* 39–41.

[2] *Burge's Colonial and Foreign Law* (vols. i. ii. and iii.). Edited by Mr. Justice Wood Renton and George Grenville Phillimore. (London: Sweet & Maxwell.)

the status and organisation of corporations (except *qua* aliens) do not enter into it. Both are individual matters: and one is a business matter. We can hardly agree that the colonial system of indentured labour rests entirely upon contract. It takes its origin, in each individual case, out of a contract. But a contract which is penally enforced, and which involves the acceptance of a complicated variety of provisions which cannot possibly be grasped by the labourer, is really a matter of status, at any rate as completely as marriage. It is difficult in practice to distinguish it from terminable slavery of a mild type.

The topic of Personal Law, thus conceived of, is treated by the editors in an exhaustive and scientific fashion. Beginning with general chapters on the Conflict of Laws and the conception of Domicile, vol. ii. proceeds to discuss the Law of Nationality and Slavery. Unlike the Roman jurist, "Burge" thinks of the former conception before the latter: this has the advantage of bringing the chapters on Nationality and Domicile into juxtaposition. Along with Slavery it is interesting to find analogous kinds of status treated, such as Indentured Labour, as well as penal deprivation of rights—though it is rather bizarre to find in this connection a paragraph on Titles and Decorations. They proceed to deal with the Child, under the various aspects of Legitimacy, Adoption, Attainment of Majority, Parental Power, Aliment; and with this vol. ii. comes to an end.

We might have expected Guardianship to have occupied the next place, but it is relegated to the opening pages of vol. iv. Vol. iii. is concerned throughout with the marital relation. A sketch of the history introduces the subject, and there follow chapters on Capacity, Form, and Nullity, after which the rules for the solution of conflicts of laws on these topics are expounded. Next, assuming a valid marriage, we get its consequences on Capacity and Property: the latter head being split up into seven chapters dealing respectively with various legal systems, and being followed by another on the solution of conflicts. Lastly there is a detailed discussion of Divorce.

It is difficult, in such a mass of material, to single out for special mention or criticism any particular feature. To controvert the editors' views, in particular instances, even were it a hopeful adventure, would give a false impression of the studiously impartial attitude which they constantly maintain in debatable matters. The reader will find the rival opinions succinctly and fairly stated in every case, and adequate references made to authorities.

A few slight criticisms may, however, be ventured.

In the chapter on the Ceremony of Marriage we miss all discussion of the English form; much is said about banns, but nothing (apart from its time of day) about the actual ceremony—the importance of the responses, the witnesses, the publicity. These are important and controverted questions. But, after all, the book is not a compendium of English law.

On p. 253 of vol. iii. it is stated that incapacities based on racial considerations or public policy will not prevent the parties from marrying in foreign countries. This can hardly be so since the Hague Marriage Law Conventions, in the case of persons who come within their ambit, as the right of contracting marriage is there reserved entirely to the disposition of the national law, without qualification except in the single case of religious disabilities. Nor do we quite see why foreign Courts must necessarily ignore the British Royal Marriage Act of 1771. Surely they may well regard it as applying in the case of princely persons whose personal law is English? The mere fact that it was passed in the interests of British state policy is not enough to condemn it. All British statutes are so enacted, and it is to generalise the objection which exists to penal and religious disabilities somewhat widely, to extend it to all disabilities of a quasi-political nature. Again, the statement (iii. 264) that the forms of marriage are essential which are required by the personal law, appears to be Burge's ancient view, and is not corrected except by reference to the Hague Convention, which does not apply everywhere. Perhaps all that is meant is that the country of the personal law may treat as invalid a marriage accomplished without its chosen forms. But this might have been made clear. We may perhaps also note that the name of Weiss should have been deleted on p. 14 of vol. ii. (note *e*). At p. 776 of vol. iii. the remark is made that a bankruptcy outside the United Kingdom does not operate as an assignment of real property in England. In view of their subsequent volumes, we should like the editors to consider 11 & 12 Vict. c. 21 s. 7 (which, curiously, was not referred to in *In re Macfadyen & Co.*, 1908, 1 K.B. 675). It might perhaps be useful to have printed the discussion of the basis of jurisdiction in divorce in the respective colonies in the chapter on "Private International Law regarding Divorce." The reader must look for it in the "Divorce" chapter. At the Cape, jurisdiction was formerly assumed on the ground of casual presence; and the assumption by Morice that *Le Mesurier's* case shows this to have been erroneous is inaccurate, as the Judicial Committee in that Cingalese case expressly disclaimed any intention to give a general decision on the attitude of the Roman-Dutch law on the point.

Tootal's Trusts (vol. ii. p. 47) can hardly, after Pigott's and Westake's criticism, be relied on as an absolute authority that there cannot be such a thing as Anglo-Chinese domicile. No reference is given to the case of *Lauder*, stated at p. 50. It is regrettable that *Swifte* v. *Swifte* was not reported in time to be incorporated in vol. iii.

These trifling criticisms are negligible in the case of a work of the scale and thoroughness of the imposing volumes before us.

Some idea of the exhaustive and extensive character of the information contained may be gathered from the citation of a few of the many curious and recondite points which are to be found in this remarkable epitome of learning. Adoption is legalised in West Australia, New Zealand, and Nova Scotia, and (what may be news to some people) in British India. Marriages

of the Royal Family are excepted from the requirements of the Marriage Acts, and depend on the Common and Canon Law. Uncle and niece can marry in some of the United States; and in England a great-aunt can marry a great-nephew, just as she could a cousin. In Louisiana, the proprietary rights of consorts change with their changing domicile. There is no divorce *a vinculo* in the Channel Islands, nor in several of the West Indian Colonies.

The British and American countries which recognise adoption generally make the status dependent upon an order of a tribunal. The editors think that in the United States this involves the recognition of the relationship so created throughout the Union, because of the constitutional obligation to give "faith and credit" to each other's judicial proceedings. But surely an administrative order does not become a judicial proceeding by being clothed with judicial forms? Any curious and novel institution might in this manner be enforced on the Union by a single State, merely by committing its machinery to the Courts. A matter of the exercise of a more or less arbitrary discretion cannot be considered a "judicial" proceeding, unless by prescriptive usage. Though the analogy of guardianship is tempting, the analogy disappears on investigation. For the process there is to settle who has the best legal right to the appointment. In adoption the jurisdiction is purely voluntary.

The comparison of the rights of aliens in different countries is extremely interesting. A foreigner cannot be a bishop in Spain, nor an executor in Maryland. Neither can he be a chemist in Servia, nor a maritime broker in France. Argentina is, like the United Kingdom, liberal in admitting strangers to the Bar. The two countries are almost alone in that respect, for the liberality of Monaco is scarcely avoidable.

The full account given in vol. iv. of the Family Council (with special reference to guardianship) will attract much attention.

We may cite as a good instance of the editors' power of bringing into rapid focus the essentials of a case, the discussion (iii. 786) of the bearing of *De Nicols* v. *Curlier* on *Lashley* v. *Hog*. The crucial distinction, that the French marriage (in *De Nicols*) "conferred an actual binding proprietary relation, the binding nature of which no act of either of the parties contracting marriage could affect or qualify," is at once thrown into relief; the editors considering that the decision leaves unaffected *Lashley* v. *Hog*, where there was no *proprietary* interest on the part of the English wife which she could protect against the husband's extravagance or arbitrariness by interdict.

The labour of compilation, investigation, and judicious decision involved in the work must have been enormous. The editors have certainly laid the legal world under a considerable debt. We can only express great admiration of the public spirit which is actuating them in advancing towards completion so useful and admirable a compendium of universal law.

T. Baty.

METHODS OF LAND TRANSFER.[1]

This re-presentation of the case for compulsory general registration of title in the United Kingdom by the Registrar of the English Land Registry, who may be said to personify the system as at present initiated and worked in England, is eminently of the class of legal studies intended for the student of comparative law; and the study in this case is rendered one both of profit and pleasure by the variety of information given, the clearness of exposition, the freedom from technical terms, and the emphasising of the practical considerations applicable to the subject. The author sets forth concisely the historical developments of land transfer in this country, as well as the actual procedure followed in the system of private conveyancing. He shows how in this respect we have fallen behind the Continental nations like Germany, Austria, Russia, and Switzerland, not to mention our own Dominions of Canada, Australia, and New Zealand, etc., who starting late in the path of reform have carried it farther than ourselves, and thus drawn nearer to the ideals considered by the author as necessary characteristics of a system of land transfer—security, simplicity, accuracy, cheapness, expedition, and suitability to its circumstances, and to which some would add publicity as a necessary corollary.

While the author naturally advocates the claims of the system of registration of title to superiority in these attributes, he does not seek to minimise the fact that in England and Scotland (to mention no other countries) it has not yet won the adhesion of the legal profession as a whole, nor even the sympathy of the Courts, and the public interest in it has not yet compelled its general adoption. From the beginning of reform in this matter, which may be dated from the Royal Commission of 1828, the advocates of a system which shall be simpler than the private conveyance have included the most eminent names in English law. The modern tendency to extend the scope of the functions of the State and the right of the State (so often exercised in our legislation) to control and modify as circumstances require the individual tenures of land in the common interest seem to make it inevitable that in the near future title to land will be placed on a uniform basis, and its transfer facilitated by its being made as readily negotiable as possible. It is undeniable that the chief element of cost in the present system of private conveyancing is that of deducing title to the property. The work of deducing title is done afresh on every transaction with the land. The fact that the deed of conveyance is the only source of title entails the risk of loss, and makes possible complications and clash of interests between legal and equitable interests in the property. The State has no official knowledge of the transaction, and the cost of transfer of property once registered

[1] *Methods of Land Transfer.* Being eight lectures delivered at the London School of Economics, May and June, 1913, by Sir Charles Fortescue-Brickdale. (London, 1914.)

is half that of the older system. It may well be that the system of private deeds has many considerations in its favour: its present possession of the field of conveyancing, the all-sufficiency of the deed, the greater flexibility of the deed as a legal instrument than the register, the national instinct for the secrecy of individual transactions by private persons, and for freedom from official inquiries and control, and even the fact that the purchaser in many cases does not contemplate the possibility of parting with the land he has acquired, and does not think that its bearing a registered title will be of any financial advantage in such an event. The success of the system has, moreover, been hindered by the administrative conditions, financial, *e.g.* that the Registry must pay its own way, and others; and the introduction into the later Acts of the "possessory title" of land which only acquires indefeasible force by lapse of time (*vires acquirit eundo*), although meant as a stepping-stone to absolute title, has received no sympathetic support, and gives no such saving of cost after the expense of first registration as the absolute title. Sir Charles Brickdale cites the experience of other countries (Australia) to show that land with a clear title resting on a State guarantee is worth commercially more than a title based on private evidence requiring a special investigation; and the fact that in the United States the insurance of land titles is a regular business shows that a good title has a distinct commercial value of which the landowner might take advantage. Without dwelling further on the aspects of a question which is still in a sense *sub-judice*, it is sufficient to say that this work should command the respectful attention of the most determined supporters of the private conveyance.

G. G. P.

REGISTRATION OF TITLE IN THE FEDERATED MALAY STATES.[1]

The system of registration of title under the Malayan Regulations follows the lines of the Torrens system in Australia, with the same purpose, viz. to make the register all-sufficient proof of title, and with the same main features, viz. the warranty by the State of an indefeasible title, an insurance fund to cover loss by wrongful registration, compulsory registration of titles to lands granted by the Crown, the recognition of only one estate for the purposes of the register without distinguishing between legal and equitable estates, the transfer of registered interests by entry in the register, the duplication of all evidence of entry and transfer, the protection of collateral rights by caveats entered in the register, the description of the property by official maps, the creation of mortgages by charges instead of the transfer of the proprietor's estate, and simple and statutory forms of

[1] *A Short Treatise on Registration of Title in the Federated Malay States.* With reports of cases decided in the Supreme Court under the Land and Mining Laws, 1907-13. By J. R. Innes. (Kuala Lumpur: F.M.S. Government Office, 1913.)

instruments. The author describes the system by comparison with the Australian ones, and indicates as peculiar features of the Malayan system the non-registrability of conditions and easements; the provision that any transfers, transmissions or charges of land not made in accordance with the Regulations are to be null and void, and (as a result of a recent decision of the Judicial Committee of the Privy Council, *Port Swettenham Rubber Co.* v. *Loke Yew*), the principle that notice of an unregistered charge upon registered land which is the subject of a transfer affects the registered transferee so as to make him a trustee for the owner of the unregistered interest even though not protected by a caveat. On the other hand, analogies from English law are admitted, in the recognition of a kind of equitable mortgage by deposit of certificates of title; in distinguishing agreements for transfer or sale from the records of completed transactions so that the former can be given effect to in spite of not being registered (the *Port Swettenham Rubber Co.* case); the protection given to lesser estates than the full ownership, by registration, such as life interests; the permission to describe registered holders as trustees (though the nature of the trusts cannot be entered in the register); and the registrar's power to protect trust interests by entering a caveat in behalf of them in his discretion. At the same time the customary native tenures are safeguarded. This timely little work is a welcome addition to the literature of registration of title, now extending to all parts of the British Empire; and it shows that even in British Dominions where the system has a clear field it has still to reckon with the opposition of ideas and principles based on the older system of private conveyancing, regarded by the author as out of place in countries where the State creates a uniform title the recognition of which necessarily subordinates the interest of the individual on equitable grounds to the general benefit of the community.

G. G. P.

CONSULAR TREATY RIGHTS.[1]

This volume treats clearly and concisely the question of the rights of consuls under treaty, especially as regards the duty of taking charge of and administering the property of deceased subjects of their respective States in the Courts of the countries in which they exercise their functions. The author, an Austro-Hungarian Consul in the United States, cites the texts of the various commercial treaties to which the United States have been parties, which either contain express stipulation to this effect or confer it by granting the rights of "the most favoured nation." There is also a summary of the decisions of the United States State Courts and of the Supreme Court on

[1] *Consular Treaty Rights.* By E. Ludwig, Austro-Hungarian Consul in the United States at Cleveland, Ohio. (The Werner Company, Akron, Ohio.)

the question—similarly raised by treaty directly or indirectly—whether consuls have this right exclusively or concurrently with the public officer designated by the State law for the administration of deceased persons' estates generally. Lastly there is a commentary on the interpretation put on the most-favoured-nation clause with reference to consular treaty rights. It is familiar knowledge to students of international law that two distinct interpretations have been placed on this clause. The European view, broadly speaking, is that it confers immediately and without conditions all the rights given by such other treaty. The view continuously maintained by the United States is that the clause applies to "gratuitous privileges," and does not extend to privileges granted on condition of a reciprocal advantage (see J. B. Moore, *Digest of International Law*, v. 273). It has been suggested that the Hague Court might well be invoked to decide between these opposing doctrines. But as regards this particular question, viz. the capacity to exercise ordinary consular powers, the authorities show that the United States Executive and various State Courts have held that this may well fall within the clause, and the Supreme Court has left the question open (J. B. Moore, v. 311, 312) in a case where it decided that the treaty invoked for that purpose (United States and Argentina in 1853) did not give the consul the right of administration in this case exclusively of the public officer set up by the municipal law for the administration of intestate deceased persons' property generally. There seems to be good reason for holding with the author that if the words of the treaty are sufficient to give this jurisdiction (especially where the treaty, *e.g.* that between the United States and Sweden of 1911, gives the consul the right to be appointed administrator in such cases), it should be treated as preferentially assignable to the consul, as closely connected with his rights and functions of protecting the interests of the intestate deceased subjects of the State which he serves, though in conformity with the procedure of the municipal law of the State within whose territories he exercises his office. It is to be remembered that in the United States international treaties have the force of law and are equal to, and perhaps rightly regarded as superior within their sphere to, the ordinary municipal law, while in countries like our own they have no such effect till applied by legislation. Our Courts have indeed declined to recognise the right of a consul to have any privileged position in the matter of administration of the estate of a deceased intestate subject of his country (*Aspinwall* v. *Queen's Proctor*, 2 Curteis 241); but provision has been made for his right to represent the proprietary interests of such a person in this way pending appearance by absent heirs or persons interested, by treaty, *e.g.* that between Great Britain and the United States in 1900. The present work is a valuable addition to the literature of international law on its commercial side, in which the consul discharges a function of daily increasing importance.

G. G. P.

THE GOVERNMENTS OF EUROPE.[1]

Dr. Ogg's position of detachment gives a peculiar value to his studies of governments. Beginning with the British Government, he traces in some 190 pages its origin and history from Anglo-Saxon times to the present day. The chapter on "Political Parties" is specially interesting as the opinion of one who is outside the arena of party politics. The latter part of the chapter outlines the trend of political thought during the last few years. Dr. Ogg's last chapter treating of Great Britain is entitled "Justice and Local Government." In describing the English judiciary he states that the number of judges is variable. If he by this means to convey the idea that the number of judges can be increased by the Executive Government without the sanction of Parliament, he would seem to have misunderstood the situation. Speaking of London, Dr. Ogg remarks with truth that "the unique governmental arrangements are the product—part of historical survival and part of special and comparatively recent legislation."

Passing to the creation of the German Empire, which Dr. Ogg justly describes as one of the most striking among the political achievements of the past hundred years, he commences his retrospect at 1806—the year which saw the extinction of the Holy Roman Empire—and outlines the "Napoleonic Transformation" before going on to discuss the immediate causes of the unification of Germany in 1871. The federal character of the Empire is best shown by the fact that Germany now contains twenty-five States, and as Dr. Ogg points out, "in 1871 the sovereign organs and powers were partly centralised." In two chapters entitled "The Imperial Government, Emperor, Chancellor, and Bundesrath," and "The Imperial Government, Parties, and Judiciary," the whole of the machinery of the Empire is concisely set out. Dr. Ogg also treats individually with the several States forming the Empire.

The history of the Government of France commences at 1789 with the appropriate heading "A Century of Political Instability." After leading the reader through the anarchy of the Revolution to the wars of the Napoleonic era, a period which witnessed a complete transformation in the internal government of France, Dr. Ogg describes in detail the powers, privileges, and duties of the President, the Ministry, and Parliament. He discusses with reference to electoral reform the abandonment of the *scrutin d'arrondissement* and the return to *scrutin de liste* and proportional representation, mentioning that it has been adopted by some other countries.

In reference to Italy, Dr. Ogg observes that "in no continental country has there been a more deliberate or a more unreserved acceptance of the essential principles which underlie the parliamentary system of Great Britain. No one of the three sovereigns of United Italy has ever sought for an instant

[1] *The Governments of Europe.* By Frederic Austin Ogg, Ph.D., Assistant Professor of History in Simmons College. (New York: The Macmillan Company.)

to establish anything in the nature of personal government." After describing the form of government, Dr. Ogg goes on to discuss the difficult problem of the "Quirinal and Vatican," and in reference thereto says: "Italy differs from other nations of importance in containing what is essentially a State within a State. The capital of the kingdom is likewise the capital of the Catholic world." Dr. Ogg is of opinion that the Church is granted a very large measure of autonomy, but is not above the law of the land.

Switzerland as we now know it Dr. Ogg tells us is the product of the middle and late nineteenth century, but its origins are to be traced to a much earlier period, beginning with the alliance of the three forest cantons of Uri, Schwyz, and Unterwalden in 1291. The dominance of the federal principle is carefully explained.

The historical aspect of the Government of Austria-Hungary has received very careful treatment. Dr. Ogg tells us that in later twelfth century King Béla III. inaugurated a policy—that of crowning as successor the sovereign's eldest son, while yet the sovereign lived—by which were introduced in effect the twin principles of heredity and primogeniture. Dr. Ogg treats separately of the individual governments of the empire of Austria and the kingdom of Hungary, and he devotes a chapter to the joint government—a unique political relationship resting on the Ausgleich of 1867.

The remainder of the book deals with the less important countries of Europe. The governments of Holland, Belgium, and Denmark are carefully and systematically explained, as also those of Norway and Sweden, and an interesting paragraph appears on "The Swedish Norwegian Union of 1814–1905." Dr. Ogg's concluding chapter—"The Iberian States"—is attractive on account of his reference to recent political events in Portugal.

This book has been compiled with care and accuracy as to detail and will be useful to all who are interested in varying forms of government and constitutional law.

R. E. W.

NOTES.

Legal Aid Societies in the United States.—Dean Walz, of the University of Maine College of Law, recently undertook an inquiry into the existing practice of legal aid society work in the United States, and the results of it have been published in a paper in the *Green Bag* (March 1914), of which the following is a brief epitome:

"Legal aid societies," he writes, "are generally unincorporated and voluntary associations, rarely ever corporate bodies, established by private individuals, or, in one case at least, city governments, such as the Board of Public Welfare of Kansas City"—the only municipal legal aid society in existence in the States. The purpose of legal aid societies is to render gratuitously, if necessary, to all that appear worthy thereof such legal assistance as, by reason of their poverty, they are unable to procure for themselves, provided that their case is unquestionably meritorious.

The first legal aid society was established early in 1876, when a number of public-spirited Germans in New York City founded the German Law Protection Society, not for charity, but for justice and the enforcement of all just and honourable claims on the part of such poor German immigrants as were imposed upon by reason of their general inexperience of conditions in the new world. The society prospered so much that in course of time, as in the case of the Chicago Legal Aid Society, the number of United States citizens applying for its aid exceeding that of any other nationality, including the German, a small fee of 10 cents was charged because the earlier applicants were unwilling to accept as a charity what they were able to pay for, at least in part; and later on, 10 per cent. of all sums above $10 recovered for applicants was charged by the society and used for current expenses. From its beginning the society refused to collect claims for storekeepers, but did all it could to secure the rights of wage-earners, men, women, and children, without any distinction of nationality, religion, or race; and in all its dealings it strictly carried out the principle that, before any legal steps were taken, both sides to a case should be given a full, fair, and impartial hearing.

In 1912 this legal aid society had eight flourishing branches in New York City. It published the *Legal Aid Review*, the *Log Book for Sailors*, and the *Guide for Immigrants*. In that same year it aided 37,796 people, nearly half of them not only United States citizens, but also native-born. Of all these 37,796 cases it carried only 2,448 cases into Court, or less than 7 per cent.

of the total, and of these cases it won nearly 90 per cent.—full proof of the great care used by it in sifting the evidence and getting at the facts before taking legal proceedings. The rule that a man must be poor before the society would aid him was strictly maintained, and a poor man was defined as one whose income is just sufficient to maintain himself, but insufficient to meet extraordinary demands.

The scope of legal aid society work naturally divides itself into two great divisions: wage claims on the one hand, and matrimonial cases and domestic difficulties on the other. In the case of loans, legal aid societies, after ascertaining the true facts, have generally made a tender of the amount really due, and, if refused, have deposited the tender in a bank, notifying the claimant of the fact and sending him a cheque with "in full settlement" endorsed upon it. If accepted, that settles the case; if refused, the money is in the bank and the burden of going to law is placed on those shoulders that can most easily bear it. As regards domestic difficulties, the great problem is desertion by the husband, non-support, wife and child abandonment. Divorce cases are not generally taken by any of the legal aid societies; never where the party applying does so merely with a view of marrying another, and never in jurisdictions where the Court allows the attorney for the wife the fees paid by her husband for the maintenance of her suit. Petty crimes are not generally taken by legal aid societies, but left to the probation officers, as time and lack of facilities generally forbid the extension of their work in that direction. Another point to be noted is the practice of the societies not to take up bastardy cases nor those of personal accidents. As regards servants' cases, so far as known, no case has been taken up where servants have left their mistresses abruptly, without a moment's notice, and at the most unexpected and most inconvenient times. "Who comes into equity must come with clean hands."

In the methods followed by the societies, the great point is to avoid, on the one hand, interfering with the regularly established practice of the members of the legal profession, and to guard, on the other hand, against the reproach so frequently heard that legal aid societies are merely a new-fashioned scheme for lawyers to get business. So little is this the fact that, if it happens that a man able to pay an attorney applies for aid to a society, he is not even referred to a particular lawyer, though he should request it and even urge it. Such a case is wholly outside the scope of a legal aid society's activity, and no society will knowingly step outside the limits of its proper sphere.

The society is a peace-maker and arbitrator, not a lawyer that defends his client in any case and at all events. Hence there have always been men claiming that a legal aid society had no right to charge any fee, even though it be but a dime. This view has not been generally accepted. If the applicant is capable of paying he is expected to pay a nominal fee, not less than 10 cents, nor more than 25, and also 10 per cent. on all

sums collected exceeding $10; all of which money goes towards defraying running expenses, such as room-rent, payment of an attorney, stenographer, etc. The practice of the New York Legal Aid Society has apparently established this view, and is based on a desire to save the applicant's self-respect. The reasons opposed to this practice are two: first, that the legal aid society is a charity and not a collection agency; and second, that it reserves to itself the right at any time to decide against its clients where justice requires it. As a fact, however, this charging of 10 per cent. is a matter of theory rather than of practice. It is the rarest thing for a legal aid society, that of New York excepted, ever to get a claim exceeding $8. For years the society will find the maximum collection to be between $5 and $7, while the minimum claim often goes as low as 50 cents.

Directly or indirectly, the legal aid societies are bringing about, or have brought about, the establishments of model municipal Courts; the abolition of the "jack-rabbit practices" of many of the justice Courts of the West; the prevention of foreigners from being kidnapped and forced to work on the oyster boats off the coast of Maryland; the regulation of loan agencies and the assignment of wages, especially the provision that such an assignment must have the signature of the wife as well as the written acceptance of the employer of the workman; the organisation of credit unions and remedial loan associations; the protection of the sailor against the crimp; the founding of chattel mortgage societies and personal loan associations; and much other legislation, impossible of enumeration here, and of the greatest benefit to the people of the United States, to rich and poor alike, allaying social resentment and suspicion.

Legislative Drafting Research Fund.—In 1911 the Board of Trustees of Columbia University were entrusted with a sum of not less than $15,000 annually for five years for research work in legislation and public administration. The work is conducted under the supervision of an administrative board of which Professor John Bassett Moore is Chairman. The funds provided for the first five years are to be expended in experimental work to determine whether the purposes of the fund justify permanent endowment. Seven men, all lawyers, are devoting their entire time to the work. In addition to this permanent staff, lawyers and law teachers in various parts of the country are co-operating.

The work, according to a statement issued by authority, consists of studies in legislation and in the organisation and procedure of administrative departments and the application of the results of these studies in the actual drafting of legislative bills for committees or members of legislatures, public officers, or private organisations. No reforms are being initiated or advocated and no propaganda is being carried on. Questions as to the wisdom of the policies underlying proposed legislation are not dealt with. It is the business of the board to try to translate propositions as to legislation into constitutional, reasonably precise, and effective statutes.

Constitutional limitations and statutory construction are being studied from the constructive point of view—that is, to discover, if possible, the means of giving effect to legislative proposals and yet complying with constitutional restrictions and observing judicial decisions respecting the construction of statutory language.

Since much of the United States legislation deals with the organisation, powers, and duties of administrative officers or agencies, the problem of providing administrative processes or devices likely to result in economical and efficient enforcement of statutory provisions makes necessary a large amount of research work in public administration.

The members of the staff do not teach. They are, however, accumulating valuable experience and materials in the field of political science which may, in the future, be of considerable assistance to the teaching at the University.

Yukon Territory.—"There is a likelihood," *United Empire* states, "that the proposals which have been put forward for some time past for the incorporation of Yukon with British Columbia will shortly be realised. It may be recalled that extensions of territory by the inclusion of lands immediately to the northward of their former limits were accorded by the Dominion Parliament to Quebec, Ontario, and Manitoba some two years ago. Dethroned thus from first place in point of size, British Columbia has since continuously agitated for a similar privilege. The demand is the more reasonable as Yukon is physically a continuation of British Columbia, and an extended railway connection, leading ultimately to the U.S.A. territory of Alaska, has not only been projected, but Sir Richard McBride, Premier of British Columbia, has for some time past been busily engaged in a serious endeavour to bring about its early construction. . . . Under a Territorial Constitution the area is governed by a Commissioner, assisted by a Council of ten elected members, and sends a single representative to Ottawa. The annexation by British Columbia will add over 200,000 square miles to its area, and will relieve the Dominion Government of considerable expense for policing and general administration."

Comparative Law in Blue Books.

Ancient Monuments.—A supplement (Cd. 7151 ; 2*d.*) to the White Paper[1] laid before Parliament in 1912 respecting the preservation of ancient monuments has been printed. It contains the Hungarian law of 1881 and the French law of December 31, 1913.

Commercial Travellers.—Another supplemental piece of work (Cd. 7031 ; 9*d.*) issued by the Foreign Office embodies the alterations in the regulations relating to commercial travellers which have been notified to the Board of Trade since the publication of the previous Blue Book in 1910.[2] The object of the compilation is to show in a summary form the regulations

[1] See Journal, vol. xiii. p. 150.

[2] See Journal, vol. xi. p. 512.

applicable to British commercial travellers which exist in British India, British self-governing Dominions, the Crown Colonies and Protectorates, and in the principal foreign countries, the special taxes to which commercial travellers are liable, and the Customs treatment accorded to samples brought by them. In an addendum are set forth particulars regarding the treatment in the United Kingdom of foreign commercial travellers and their samples.

Civil Service.—The Royal Commission appointed to report upon the Civil Service has obtained information through the Foreign Office and Colonial Office upon some points as to what is being done elsewhere. A series of replies from the Austrian, Hungarian, Bavarian, Belgian, French, Prussian, and Swedish governments, and the government of the Netherlands, have been published in the first appendix (Cd. 7339; 1*s.* 7*d.*) to the Fourth Report, together with information from the Australian States. They show the basis of the system of recruiting and discipline in the Civil Service, whether by legislative act or administrative order. One section is devoted to the conditions of admission, specifying to what extent qualifications are required to be of general intelligence or of a professional character. Questions as to the necessity for private means and methods of nomination are also considered, and information given as to the employment of boys under seventeen, having in mind the blind-alley work in the English Civil Service. Special attention is also directed to the conditions of women's employment. Another section deals with the organisation of the Civil Service, and a third with the nature of the discipline and the means by which it is exercised, giving in detail such matters as promotion and appeal from dismissal, together with the formation of associations of civil servants and their right to be heard by the officials of the departments.

Middle Temple Library.—In a recent interesting note in the Journal,[1] Professor Harrison Moore compared the elaborate equipment of American law libraries with the conditions of similar English institutions, and concluded that the "English libraries have a good deal to learn from America." The law libraries, though not perhaps in a position to be so receptive of new ideas as the public libraries, cannot fail to be influenced by the general movement at the present time towards higher standards in librarianship, and the libraries of the Inns of Court are not an exception to the rule. A sign of the times is the publication of a new catalogue[2] of the Library of the Middle Temple. It does not yet "contain the laws of all ages and all countries," as Sir Fortunatus Dwarris, the author of the

[1] See Journal, vol. xii. p. 548.

[2] A Catalogue of the printed books in the Library of the Honourable Society of the Middle Temple, alphabetically arranged, with an index of subjects, by C. E. A. Bedwell, Keeper of the Library under the direction of the Masters of the Bench. Printed at the University Press, Glasgow. 5*s.* to members of the Inn, 10*s.* to non-members for the three volumes.

well-known work on statutes, desired when he laid the foundation stone of the present building, but the new catalogue shows that considerable attention has been paid to making more complete the collection of recent legislative enactments of the various parts of the British Empire. The laws, for example, of the lately constituted "Northern Territory" and the "Territory for the seat of government" of Australia have been added to the Library. The *format* of the catalogue is excellent. The subject-index, instead of being cramped into double columns and smaller type, is printed on the same scale as the author catalogue and extends to more than five hundred pages, conveniently bound in a separate volume. The plan of the index is helpful to students of comparative law since it is possible by means of the cross-references to ascertain what legal treatises of foreign countries are available in the Library upon any particular subject. It may be added that any one, even though he be not a member of the Inn, who is "curious to see somewhat which he cannot so readily finde elsewhere" can obtain access to the Library, whose utility no doubt will be increased by the completion of this catalogue.

Copyright in Italy.—The Italian Government have assured the British Government that the widest protection is granted in Italy to works of British origin, to the authors of which is reserved the exclusive right of every form of reproduction, execution, or representation by any means whatever, including the cinematograph, as well as mechanical musical instruments. Accordingly the provisions of the Copyright Act, 1911, have been extended to works of which the country of origin is Italy by an Order-in-Council gazetted on February 10, 1914.

Companies in China.—By an Order-in-Council gazetted April 3, 1914, some additional formalities are required in connection with the registration of companies. A list of the directors showing the names, nationality, and address of each must be filed, and a similar list deposited in the January of each year. Further provision is also made in respect to the breach of any municipal regulations or bye-laws for any foreign concession in China.

Pacific Islands Protectorate.—By an Order-in-Council gazetted on January 27, 1914, provision was made for the extradition of fugitive criminals from Pitcairn Island, Ocean Island, and Fanning Island, and the necessary authority vested in the Deputy Commissioner for the Western Pacific to act under Extradition Acts. Another Order-in-Council of the same date makes provision for the exercise of the jurisdiction of the High Commissioner for the Western Pacific in the extradition of offenders. A third Order deals with probate and administration in the British Solomon Islands Protectorate, and the Gilbert and Ellice Islands Protectorate, and Ocean Island. By it an official administrator is appointed to administer the estates of deceased persons, and until such appointment is made the Resident Commissioner in each Protectorate is to act in that capacity.

A Modern Alchemist.—A belief in alchemy seems still to exist in the East.

A decision has just been given by the Court of Cassation of the Native Courts of Egypt rejecting an application of a person condemned for obtaining money under the false pretence that he could turn silver into gold. The applicant urged that there was no false pretence, because he possessed the power which he claimed, and would have converted the silver and copper coins which he received into the more precious metal. The Court, however, refused to accept the plea, declaring that the promise to perform an impossibility was of itself proof of fraudulent intent in the absence of any evidence that the promisor could carry out his engagement. The alchemist in this case had not offered any evidence of the kind, and though individuals in Egypt may still believe in alchemy, the Courts, it seems, are sceptical about it.

This decision may be compared with another given by the Court of Cassation some years ago upon an application against a conviction for a similar offence where the applicant had claimed by divination to be able to forecast the movements of stocks and shares. He had been convicted by the trial Court on the complaint of a person who had paid him for "tips," and had subsequently lost money in his speculations. It appeared, however, that the "tips" which had been given had brought a profit to the speculator, and that the losses were incurred by subsequent dealings. In these circumstances the Court of Cassation quashed the conviction, holding that the truth or falsity of the diviner's claim to know the future, by looking into the entrails of animals, was immaterial. The claim he had made was that he could forecast the future movements of stocks, and that he had substantiated so far as the applicant was concerned; whether by divination or by mere ordinary skill it was not necessary to decide. For, as the Court remarked, the only device actually proved against the accused was that he foretold the future correctly.

Water on the Boundary between Two Farms.—In an interesting note in the February number of the *South African Law Journal* it is remarked that "the difficulty of applying the Roman-Dutch authorities to the conditions of South Africa, especially in the matter of rain-water in pans on the high veld, where such water is a valuable rarity, was seen in the case of *Breyten Collieries, Ltd.* v. *Dennil* (30 S.A.L.J. 500; fully reported in [1913] T.P.D. 261). In that case, where the two judges (Wessels and Mason JJ.) who tried it, differed, it was said by Wessels J., that most, if not all, of the rules laid down in the *Digest* on analogous matters were quite antiquated and out of place in a modern system of law. He, therefore, preferred to follow Art. 673 of the French *Code Civil*. The question was as to the user of rain-water in a pan standing on the boundary line between two farms, collected in such a way that four-fifths of the water lay on one farm and one-fifth on the other. In some seasons the pan had dried up. One owner, who wished to use the water for mining purposes, sought to confine the other, who wanted the water for agricultural purposes, to the use of the water in the above proportions. Wessels J. held that either owner

could use the water lying on his farm even if such user might drain the whole water from the pan. He held that, in the absence of authority declaring that there was a natural servitude, neither owner could interfere with the other if he chose, *e.g.*, to drain his land and use it as a potato field. He indicated, however, that the rule might be different if the pan had been an extensive lake which never ran dry, and which, from the uses to which it could be put, such as navigation and fishing, might be regarded as a *res publica*. Mason J. held that either owner could use the water in a reasonable manner for the improvement of his property but not to the extent of draining the pan. The latter appears to be the more reasonable view, and more in accordance with the principle *sic utere tuo ut alienum non lædas*, but the law on the matter is clearly in an unsatisfactory condition considering the importance of the matter."

Torquemada and the Spanish Inquisition.—In a recent book, *Torquemada and the Spanish Inquisition*, by Rafael Sabatini, a chapter is devoted to "The Jurisprudence of the Holy Office and the First 'Instructions' of Torquemada." The author states that the first manual for the use of inquisitors was probably written about 1320, and was the work of a Dominican friar, Bernard Gui. This book—*Practica Inquisitionis Heretica Pravitatis—Bernardo Guidonis, Ordinis Fratrum Predicatorum*—summarised the experience of the inquisitors of Southern France. This book is divided into five parts. The first three deal with procedure, the fourth treats of the powers vested in the tribunal, and the last surveys and defines the various heretical sects of Gui's day.

It was probably upon this work that Nicolaus Eymeric compiled his *Directorium Inquisitorum* in the middle of the fourteenth century. Eymeric was Grand Inquisitor of Aragon. His *Directorium* is divided into three parts: the first lays down the chief articles of the Christian faith; the second is a collection of the decretals, bulls, and briefs of popes upon the subject of heretics and heresies, etc.; the third part, of which Eymeric was himself the author, deals with the manner in which trials should be conducted.

As Mr. Sabatini says on page 142, with this *Directorium* before him Torquemada set to work to draw up the first articles of his code. Additions were made to it later, as the need for such additions came to be shown by experience; but no subsequent addition was of the importance of these original twenty-eight articles. "They may be said to have given the jurisprudence of the Spanish Inquisition a settled form, which continued practically unchanged for over three hundred years after Torquemada's death." This code which was compiled by Torquemada in 1484 constituted the first "Instructions for the Governance of the Holy Office."

Seal Fisheries.—In accordance with a convention made between the United States, Japan, Russia, and Great Britain, an Act was passed in 1912 (2 & 3 Geo. V. c. 10) to prohibit pelagic sealing in certain parts of the Pacific

Ocean. By an Order-in-Council the Act was applied last year to certain colonies and protectorates; but a revised Order gazetted on May 22, 1914, has been necessary in order to make the list more comprehensive; and it now includes Bahamas, Barbados, Bermuda, British Guiana, British Honduras, Ceylon, East Africa Protectorate, Falkland Islands, Fiji, Gambia, Gibraltar, Gilbert and Ellice Islands Protectorate, Gold Coast, Grenada, Hong Kong, Jamaica, Leeward Islands, Malta, Mauritius, St. Helena, St. Lucia, St. Vincent, Seychelles, Sierra Leone, Solomon Islands Protectorate, Somaliland Protectorate, Southern Nigeria, Straits Settlements, Trinidad and Tobago, Wei-hai-Wei.

The Common Law of British Guiana.—We are indebted to Professor Lee for the following communication:

"In 1912 the Government of British Guiana issued a Commission to Mr. Nunan, now Attorney-General of the Colony, and five other gentlemen to inquire whether any changes in the Common Law of the Colony are desirable. The Report of the Commission is now issued as an official paper (No. 9598) together with the Minutes of Meetings and Report of Evidence.

"The recommendations of the Commissioners, which are on most points unanimous, are of a far-reaching character and are directed, in effect, to the substitution of the Law of England for the Roman-Dutch Law as the Common Law of the Colony. Their nature may be seen from the following extract from the Report: 'We recommend the introduction of English common law in regard to all mercantile matters, to all the domestic relations (including marriage, judicial separation and divorce, the law of husband and wife, parent and child, guardian or curator and minors, and master and servant), to the law of delicts or torts, agency, suretyship, liens, intestate succession, and in fact to all the law of persons, things, obligations, inheritance, and every other description of matters whatsoever not dealt with by legislation or otherwise expressly exempted. The English law of real property should be expressly excluded. The law relating to trustees should be dealt with by legislation adapted to the requirements of the Colony.'

"With regard to intestate succession it is proposed to adopt the English Statutes of Distribution and the Intestates' Estates Act, 1890; with considerable modifications, however, in the sense of putting husband and wife, father and mother, on a footing of precise equality; so that a surviving husband will take no greater interest than a surviving wife, and a surviving mother will share equally with a surviving father, and if she is the sole survivor will take to the exclusion of brothers and sisters. On the other hand, it is not intended to disturb the rule of the Roman and Dutch Law that 'a mother makes no bastard,' *i.e.* that illegitimate children succeed *ab intestato* to their mother. (Whether they are to succeed to their mother's relations also—a question as to which the Roman-Dutch authorities do not agree (Van der Linden, 1. 10. 3)—is not stated.) Legitimation by subsequent marriage is also preserved. But the majority of the Commission are in favour of

abolishing the legitimate portion 'as an unnecessary restriction on the will-making power, and as tending to encourage filial disobedience.'

"The above recommendations, and others too numerous to mention, are embodied in a draft Ordinance annexed to the Report. It is entitled 'An Ordinance to codify and to substitute the English Common Law and principles of Equity for the Roman-Dutch Common Law.' The Commissioners hope that it may be possible to bring it into operation on January 1, 1915. To complete the scheme of reform other legislation will be required, including a Registration of Title, a Probate, an Administration, and a Trustee Ordidance.

"The circumstances of the Colony and the felt want of a Court of Appeal for the West Indian Colonies are the motives of the very drastic changes contemplated by the Commission."

Zanzibar Order-in-Council, 1914.—Mr. J. E. R. Stephens has supplemented his article [1] on the laws of Zanzibar by the following note of recent changes:

"The islands of Zanzibar and Pemba, which were formerly under the control of the British Foreign Office, were finally transferred to the Colonial Office at the beginning of the present year. The Zanzibar Order-in-Council, 1906, and its amending Orders have been repealed by the Zanzibar Order-in-Council, 1914 (St. R. & O. 153). The main provisions of the new Order are the same as those of 1906, but certain important changes have been made necessary by the transfer of the islands to the control of the Colonial Office. The government of the islands has been placed under two officers termed respectively High Commissioner and British Resident, both of whom are appointed under His Majesty's Sign Manual. The constitution and jurisdiction of the British Court remain as before. Under the old Order-in-Council there was an appeal in criminal cases from the Court for Zanzibar to the High Court of Bombay, but the appeal now lies to the Court of Appeal for Eastern Africa, except when the accused is a Zanzibar subject (*i.e.* a subject of the Sultan) and has come within the jurisdiction of the British Court in consequence of his having committed an offence against a British subject or British-protected person. For such a person there is no appeal to the Appeal Court of Eastern Africa, nor was there one to Bombay under the old Order-in-Council. An appeal lies to the Court of Appeal for Eastern Africa from any finding, sentence, or order recorded or passed by the Court for Zanzibar in the exercise of its original criminal jurisdiction, provided that such finding, sentence, or order is appealable under the Indian Code of Criminal Procedure as applied to the Protectorate or any other law of Criminal Procedure in force in the Protectorate or any law of Criminal Procedure hereafter substituted for such codes or other law. The Court of Appeal of Eastern Africa has not any power of revision or appeal over or from any finding, sentence, or order recorded or passed by the Court for Zanzibar in the exercise of its criminal jurisdiction, other than in the

[1] Journal, vol. xiii. p. 603.

above-mentioned instance, except in cases in which the Court for Zanzibar has convicted on an appeal from an acquittal.

"In civil matters appeal lies from the order of the British Court to the Court of Appeal for Eastern Africa instead of to the High Court of Bombay as was formerly the case.

"Under the Eastern Africa Protectorates (Court of Appeal) Amendment Order-in-Council, 1914 (St. R. & O. 151), the Court of Appeal shall exercise such appellate jurisdiction and such other powers in relation to the Court for Zanzibar as are conferred upon the said Court of Appeal by the Zanzibar Order-in-Council, 1914.

"The Judges and Acting Judges for the time being of the Court for Zanzibar shall be members of the Court of Appeal."

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